Supreme Court, U.S.
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No. 02-1134

In The
Supreme Court of the United States

WYATT R. HASKELL,

Petitioner,

v.

PWS HOLDING CORPORATION, BRUNO'S INC., FOODMAX OF MISSISSIPPI, INC., A.F. STORES INC., BR AIR, INC., FOODMAX OF GEORGIA, INC., FOODMAX OF TENNESSEE, INC., FOODMAX INC., LAKESHORE FOODS, INC., BRUNO'S FOOD STORES, INC., GEORGIA SALES COMPANY, SSS ENTERPRISE, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Can a debtor use a Chapter 11 bankruptcy plan of reorganization to release or extinguish a creditor's personal and direct claims and causes of action against nondebtor third parties without the affected creditor's consent and for no consideration?

Does a Bankruptcy Court have the power to permanently enjoin a creditor from asserting his state law fraudulent transfer and alter ego claims against nondebtors where, under applicable state law, those claims are owned by and are personal and direct claims of the creditor and are not derivative claims belonging to the debtor corporation?

Does § 544(b) of the Bankruptcy Code transform a creditor's direct and personal state law claims against nondebtors based on fraudulent transfer, alter ego, breach of fiduciary duty, conspiracy, or aiding and abetting into property of the debtor's bankruptcy estate?

PARTIES TO THE PROCEEDINGS

Including the parties named in the caption of this Petition, the parties are:

Petitioner Wyatt R. Haskell, an individual.

Respondents PWS Holding Corporation, and its wholly-owned affiliates Bruno's Inc., Foodmax Of Mississippi, Inc., A.F. Stores Inc., Br Air, Inc., Foodmax Of Georgia, Inc., Foodmax Of Tennessee, Inc., Foodmax Inc., Lakeshore Foods, Inc., Bruno's Food Stores, Inc., Georgia Sales Company, and SSS Enterprise, Inc.

Respondent Chase Manhattan Bank.

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Rule 23.1 of the Federal Rules of Civil Procedure 7

OPINIONS BELOW

The Bankruptcy Court's December 7, 2000 Order [App. 20-23] below, which enjoins and sanctions petitioner Haskell, is unreported. The Third Circuit's September 12, 2002 opinion [App. 1-17] affirming the December 7, 2000 order is reported at 303 F.3d 308 (3d Cir. 2002).

STATEMENT OF JURISDICTION

The Third Circuit's opinion was entered on September 12, 2002. Haskell's Petition for Rehearing *en Banc* was denied on November 1, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 524(e): Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

11 U.S.C. § 541(a): The commencement of a case under section 301, 302 or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in Subsections (b) and (c)(2) of this section, all legal and equitable interests of the debtor in property as of the commencement of the case . . .

* * *

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

11 U.S.C. § 550(a): Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this

title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from –

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transfer.

11 U.S.C. § 544(b): The trustee may avoid any transfer of an interest of the debtor in any property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

11 U.S.C. § 1107(a): . . . a debtor in possession shall have all the rights . . . and powers . . . of a trustee serving in a case under this chapter.

STATEMENT OF THE CASE

The Decision Below

Petitioner Wyatt R. Haskell ("Haskell") seeks certiorari to review the September 12, 2002 decision of the U. S. Court of Appeals for the Third Circuit affirming an Order dated December 7, 2000 (herein the "December 7 Order") [App. 20-23] entered by District Judge Sue L. Robinson, sitting as a bankruptcy judge in the Delaware Bankruptcy Court. The December 7 Order enjoined Haskell from pursuing the claims in Count I [App. 96] ("Fraudulent Transfer Act Claims" asserted pursuant to Ala. Code §§ 8-9A-1, *et seq*. (1975)), Count IV [App. 106] ("Breach of Fiduciary Duty"), Count V [App. 112] ("Civil Conspiracy"), and Count VI [App. 112] ("Claims for Aiding and Abetting") of Haskell's Amended and Restated Complaint, then pending in the United States Bankruptcy Court for the Northern District of Alabama. Although the December 7

Order expressly holds that the provisions of the Debtors' Second Amended Joint Plan of Reorganization which purport to extinguish potential fraudulent transfer claims did "not cover any direct, personal, nonderivative claims held by creditors against nondebtor third parties" [App. 20], the Bankruptcy Court nonetheless enjoined Haskell from pursuing causes of action asserted in Counts I, IV, V and VI of Haskell's Restated Complaint. [App. 20-23]. The December 7, 2000 Order was predicated on the Delaware Bankruptcy Court's erroneous conclusion of law that the claims asserted in Counts I, IV, V and VI are "derivative" claims and was based on the Bankruptcy Court's clearly erroneous finding of fact that "the fraudulent transfer causes of action were considered by the parties in interest, including Mr. Haskell, to be assets of the bankruptcy estate." Although the Bankruptcy Court had on January 20, 2000 held that Haskell had "the right to establish that these claims are direct claims, not property of the estate" [App. 37], the Bankruptcy Court's December 7 Order concluded that Haskell had violated the Bankruptcy Court's Confirmation Order entered December 30, 1999, and sanctioned Haskell, requiring him to pay the Debtors' costs, including attorney fees. [App. 23].

Prior Proceedings

In August of 1995, Kohlberg Kravis Roberts & Co., L.P. ("KKR") had arranged a leveraged buyout of Bruno's, Inc., an Alabama-based grocery store chain. As part of that transaction, KKR caused Bruno's to issue and sell approximately $421 million in Subordinated Notes (the "Notes"). Haskell is the holder of more than $2 million in face value of Bruno's Notes.

In February of 1998, Bruno's and its subsidiaries filed a Chapter 11 petition in the Delaware Bankruptcy Court. In June of 1999, Bruno's filed a disclosure statement and

proposed plan of reorganization under which Bruno's proposed to "extinguish" all of the Debtors' claims and causes of action against KKR and others, for no consideration.

On August 5, 1999 Haskell filed a class action complaint in Alabama state court on behalf of himself and other Noteholders against nondebtor defendants KKR and others asserting claims under the Alabama Uniform Fraudulent Transfer Act ("AUFTA") (Ala. Code §§ 8-9A-1, *et seq.* (1975)), civil conspiracy, aiding and abetting and "alter ego" liability.

On December 10, 1999 (only ten days before commencement of the Bankruptcy Court's confirmation hearing on Debtors' Plan of Reorganization), the Debtors modified the "release and extinguishment" provisions of the Plan. Notice of the modifications was not published and mailed to all creditors. As modified, the Plan provided:

> 9.3 Claims Extinguished
>
> (a) As of the Effective Date, any and all *avoidance claims accruing to the Debtors and Debtors in Possession* under sections 502(d), 544, 545, 547, 548, 549, 550, and 551 of the Bankruptcy Code, including, without limitation, all of the claims that are asserted in the Haskell Alabama Action and the Huff Alabama Action, shall be extinguished whether or not then pending. [Emphasis added.]
>
> (b) As of the Effective Date, any and all *alter ego or derivative claims accruing to the Debtors and Debtors in Possession*, including, without limitation, all of the claims that are asserted or could be asserted in the Haskell Alabama Action and the Huff Alabama Action, shall be extinguished whether or not then pending. [Emphasis added.]

The Bankruptcy Court then held a confirmation hearing on December 20 through 22, 1999. During that hearing, Debtors' counsel stipulated on December 21, 1999 that if Mr. Haskell has any "direct personal claims ... there is no provision in this plan which precludes them from prosecuting those claims in a court of competent jurisdiction."[1] [App. 27]. During the three-day hearing, Haskell was given only thirty minutes to present his objections to the Debtors' plan. [App. 29]. Haskell attempted to explain to the Delaware Bankruptcy Court that (1) state law provides the guidelines for determining whether a cause of action belongs to the debtor and therefore becomes property of the estate, *see, e.g., Butner v. United States*, 440 U.S. 48 (1979), *Sender v. Simon*, 84 F.3d 1299 (10th Cir. 1996), (2) the Alabama Uniform Fraudulent Transfer Act ("AUFTA") authorizes a *creditor* to sue the first transferee or the person for whose benefit the transfer was made and obtain a judgment in favor of the creditor in the amount of the creditor's *individual*

[1] At the Confirmation Hearing on December 20, 1999, Debtors' counsel, in examining James Demme, Debtors' CEO, emphasized this point:

> Q: Now, having seen that section [9.3 of Debtors' Second Amended Plan of Reorganization], Mr. Demme, do you now recall that if any bondholder or noteholder has a direct claim against any party, including other noteholders, including public stockholders, including the infamous KKR, including the banks and including Huff, those claims can be asserted without any injunction, without any discharge by this Court?
>
> A: Yes. [App. 32].

loss,[2] (3) Alabama court decisions hold that a creditor's fraudulent transfer claim is not a derivative cause of action which must be brought in the name of, on behalf of, or for the benefit of, the fraudulent transferor;[3] and (4) under Alabama law the fraudulent transferor (Bruno's) is *not* a necessary party.[4] In other words, Haskell's claims

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[2] § 8-9A-7. Remedies *of creditors*.

(a) In an action for relief against a transfer under this chapter, the remedies available *to creditors*, subject to the limitations in Section 8-9A-8, include:

(1) *Avoidance of the transfer to the extent necessary to satisfy the creditor's claim*. . . .

§ 8-9A-8. Defenses, liability, and protection of transferee.

* * *

(b) Except as otherwise provided in this section, to the extent a transfer is voidable *in an action by a creditor* under Section 8-9A-7(a)(1), the *creditor may recover* judgment for the value of the asset transferred, as adjusted under subsection (c), or the *amount necessary to satisfy the creditor's claim, whichever is less*, or judgment for conveyance of the asset transferred. The judgment may be entered against:

(1) The first transferee of the asset or the person for whose benefit the transfer was made. . . . [Emphasis supplied.]

[3] *See, e.g., Bank of Lexington v. Jones*, 456 So. 2d 784, 785 (Ala. 1984) ("It is well settled that a fraudulent conveyance is valid as to all the world except creditors of the grantor"); *J. C. Jacobs Banking Co. v. Campbell*, 406 So. 2d 834, 847 (Ala. 1981) ("It is well settled that conveyances or transfers made to hinder, delay or defraud creditors are valid and operative between the parties when fully consummated. Neither party can rescind or defeat them"). *Also see Hays and Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149 (3d Cir. 1989), in which the Third Circuit recognized that "[c]laims asserted by the trustee under section 544(b) [of the Bankruptcy Code] are not derivative of the bankrupt. They are creditor claims that the Code authorizes the trustee to assert on their behalf."

[4] *See Simmons v. Clark Equipment Credit Corp.*, 554 So. 2d 398, 399 (Ala. 1989) ("Grantors in a conveyance assailed as being fraudulent

(Continued on following page)

against nondebtors under the Alabama statute (AUFTA) is a direct and personal claim or cause of action owned by him, and is not property of the Debtors' bankruptcy estate, and is not a "derivative" claim.[5]

On December 30, 1999, the Bankruptcy Court had signed, without modification, an order drafted and submitted on December 30 by the Debtors' counsel (the "Confirmation Order"). The Confirmation Order provided, among other things:

> 50. As of the Effective Date, *any and all avoidance claims* ***owned by or vested in the Debtors and Debtors in Possession under sections 502(d), 544, 545, 547, 548, 549, 550 and 551 of the Bankruptcy Code***, including, without limitation, *all of the avoidance claims that are* ***owned by or vested in the Debtors and Debtors in Possession pursuant to the Bankruptcy Code and applicable provisions of law*** and that are asserted or could be asserted in the Haskell Alabama Action and the Huff Alabama Action shall be extinguished whether or not then pending.
>
> 51. As of the Effective Date, *any and all alter ego or derivative claims owned by or vested in the Debtors and Debtors in Possession*, including, without limitation, all of the alter ego or derivative claims that are ***owned by or vested in the***

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are not necessary parties defendant.") *Accord, Pierce v. Pierce*, 652 So. 2d 233 (Ala. 1994).

[5] Derivative causes of action are the property of the corporation, must be brought on behalf of the corporation, and the corporation is a necessary party. Derivative causes of action are also governed by Rule 23.1 of the Alabama and Federal Rules of Civil Procedure. Fraudulent transfer and alter ego claims are not.

> ***Debtors and Debtors in Possession pursuant to the Bankruptcy Code and applicable provisions of law*** and that are asserted or could be asserted in the Haskell Alabama Action and the Huff Alabama Action, shall be extinguished whether or not then pending.
>
> 52. ***Nothing*** *contained in paragraphs 50 or 51 of this Confirmation Order or in Section 9.3(a) and 9.3(b) of the Plan* ***shall be construed to extinguish, limit or bar any direct, personal and nonderivative claim*** which may be asserted against nondebtor third parties by creditors in their individual capacity or for the benefit of other similarly situated creditors; provided, however, that notwithstanding the foregoing, creditors may not assert against nondebtor third parties any claims that are owned by or vested in the Debtors and Debtors in Possession and extinguished pursuant to Sections 9.3(a) and 9.3(b) of the Plan (as such Section is incorporated in paragraphs 50 and 51 of this Confirmation Order). [Emphasis supplied].

On January 10, 2000 Haskell filed with the Bankruptcy Court his Motion to Alter or Amend the Confirmation Order, seeking modification of the Plan and Confirmation Order so as to clarify that Haskell was not barred from pursuing the fraudulent transfer claims and other claims asserted in the Haskell action because those claims were his direct and personal claims, not the property of the estate. The Bankruptcy Court denied Haskell's request to modify the Plan and Confirmation Order, but expressly ruled from the bench on January 20, 2000 that *Haskell "has the right to try to establish the fact that these claims are direct claims*, not property of the estate":

> [Debtors' counsel]: What we stipulated to, if Mr. Patrick-Patrick's client, *Mr. Haskell, can establish that he has a direct personal cause of action*

> *that is not property of this estate, he can prosecute that action.* But he's going to have to have either determination by a court of competent jurisdiction, that it's not a derivative claim, that it's not a claim that was passed to the debtor and dealt with under the plan. We tried to reach agreement with Mr. Patrick prior to entry of the order. We wanted to put in the language *if it was property of the estate, it does not go back to Mr. Haskell, but that was without prejudice to him trying to establish that there was a direct claim, your Honor.* So we rest on our papers, your Honor.
>
> The Court: All right. Mr. Patrick, I don't think there's anything else I can do for you. *Your client has the right to try to establish the fact that these are direct claims, not property of the estate.* I'm not going to change the confirmation order to basically give your client rights that I didn't intend to give him in the first place. [Emphasis added] [App. 37].

In accordance with the Bankruptcy Court's January 20, 2000 ruling from the bench, Haskell continued to prosecute his claims in Alabama, seeking, *inter alia*, remand of the *Haskell* action to the Alabama state court and a ruling from the Alabama courts that his claims were direct and personal claims against nondebtors (rather than property of the Debtors' bankruptcy estate) and had therefore not been extinguished by the Plan and Confirmation Order. Before the Alabama Bankruptcy Court had an opportunity to rule, however, the Debtors' counsel filed with the Delaware Bankruptcy Court Debtors' April 3, 2000 Motion to Enforce the Confirmation Order seeking sanctions and a permanent injunction against Haskell.

On May 9, 2000, the Delaware Bankruptcy Court heard argument on the Debtors' April 3 Motion. At the May 9, 2000 hearing, the Delaware Bankruptcy Court stated:

> "It seems to me as though *there cannot be any dispute that the confirmation order and the record related thereto* ***specifically permits the Huff and Haskell parties to pursue personal direct claims against nondebtors***. That provision in fact, at least in my recollection and in my opinion, was an emphasized selling point for the plan of reorganization.
>
> "It seemed to me that *I contemplated having approved that, that at some point some court, and to quote the papers, "some court of competent jurisdiction" would have to determine whether Huff and Haskell's claims, whether the claims asserted were derivative or direct because you all can't agree on anything.*" [Emphasis supplied] [App. 40].

Clearly, then, the Bankruptcy Court recognized on May 9, 2000 that there had not yet been a determination (much less a final order) with respect to whether Haskell's claims were personal direct claims against nondebtors or instead were "derivative" claims which were the property of the debtors' bankruptcy estate. During the May 9, 2000 hearing, debtors' counsel conceded that "Every uniform fraudulent transfer act . . . talks in terms of direct claims" [App. 61] and that "every fraudulent conveyance act speaks in terms of a creditor's right to sue for injuries inflicted upon the creditor as a result of a fraudulent transfer." [App. 44], but argued: "calling a claim direct is not conclusive . . . What Mr. Patrick refuses to recognize is that the intervention of bankruptcy creates a new owner of that claim and the new owner became the debtor in possession. And the debtor in possession dealt with the claims." [App. 61-62].

On December 7, 2000 the Bankruptcy Court signed the December 7 Order in which it concluded:

Regardless of how the holding in *In re Cybergenics*[6] might apply to other cases, it has no application to the motion in issue. During these bankruptcy proceedings, the fraudulent transfer causes of action were considered by the parties in interest, including Mr. Haskell, to be assets of the bankruptcy estate to benefit all unsecured creditors, pursuant to § 544(b). This court and the Third Circuit, likewise, treated these causes of action as "derivative," i.e., as benefiting the bankruptcy estate as opposed to the debtors in possession or any single creditor.

Mr. Haskell has not demonstrated otherwise, despite the opportunity to do so. Based on this procedural context, Mr. Haskell is enjoined from pursuing, as personal to him, counts I, IV, V, and VI of the Haskell Restated Complaint, as such causes of action have been deemed extinguished by virtue of the holding in *In re PWS Holding Corporation*, 228 F.3d 224 (3d Cir. 2000). Mr. Haskell is bound by that decision.

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[6] The Third Circuit Court of Appeals held in *In re Cybergenics Corp.*, 226 F.3d 237 (3d Cir. 2000) (*"Cybergenics I"*), that the fraudulent transfer claims which state law provided to Cybergenics' creditors were not assets of Cybergenics or its bankruptcy estate and had therefore not been included in a sale of all of Cybergenics' assets to a nondebtor. The Third Circuit stated in its opinion:

> [W]e reach the inescapable conclusion that *the fraudulent transfer claims, which state law provided to Cybergenics' creditors, were never assets of Cybergenics*, and this conclusion is not altered by the fact that a debtor in possession is empowered to pursue those fraudulent transfer claims for the benefit of all creditors.

Because of its clear relevance to the question whether Haskell's claims were property of the Debtors, Haskell called the *Cybergenics I* opinion to the attention of the Delaware Bankruptcy Court prior to entry of its December 7, 2000 Order.

> IT IS FURTHER ORDERED that, as a result of Mr. Haskell's violation of the confirmation order, he is directed to pay the costs (including reasonable attorneys' fees) associated with the instant proceeding. [App. 22-23].

Haskell appealed from the December 7 Order to the Third Circuit, seeking reversal on the ground, *inter alia*, that the Delaware Bankruptcy Court's finding of fact that "the fraudulent transfer causes of action were considered by the parties in interest, including Mr. Haskell, to be assets of the bankruptcy estate" was clearly erroneous, unsupported by the record and contrary to the record. Haskell called to the attention of the Third Circuit the May 9, 2000 concession by Debtors' attorney that Haskell had at all times maintained that Haskell's claims were direct and personal, not property of the estate:

> Mr. Haskell's position has *always been*, your Honor, that the Alabama Uniform Fraudulent Transfer Act gives a creditor a direct claim for injuries suffered as a result of a fraudulent transfer. [Emphasis supplied] [App. 44].

The Third Circuit's September 12, 2002 opinion failed to address the Bankruptcy Court's clearly erroneous finding of fact, which had been the basis for the Bankruptcy Court's December 7, 2000 Order. Moreover, the Third Circuit's September 12, 2002 opinion below and the Bankruptcy Court's December 7, 2000 Order misstates the Third Circuit's opinion in *In re PWS Holding Corp.*, 228 F.3d 224 (3d Cir. 2000) ("*PWS I*"). *PWS I* had only addressed a debtor in possession's power to release "the estate's claims." Indeed, in oral argument on March 10, 2000 before the Third Circuit in the *PWS I* appeal, Debtors' counsel had stated:

> Mr. Miller [Debtors' counsel]: What Paragraph 52 [of the Confirmation Order] is, this was a paragraph that was put in, your Honor, to clarify that

> there was no release of third party claims, because what Paragraph 52 is intended to do, your Honor, is to make it clear that if there is a personal cause of action against anybody other than the debtor, your Honor, those are not released.
>
> Now, you can continue with those cases. And I think, your Honor, that might be the basis of the actions in Alabama, that they have direct personal causes of action. *Whether they do or not,* ***I'm not prepared to say***. [Emphasis added].

See also PWS I, 228 F.3d at 247, n. 21 ("Section 524(e) provides that the bankruptcy discharge of a debtor does not operate to relieve nondebtors of their liabilities, but by its terms it does not govern provisions in a plan by which a debtor releases *its own* claims against third parties." [Emphasis added.]) *Id.*, 228 F.3d at 247; *In re: United Artists Theatre Co.*, ____ F.3d ____, 2003 WL 68020 (3d Cir. 2003) ("*PWS*'s holding makes clear that it was not addressing a release that affects the liability of third [i.e., nondebtor] parties. . . .").

In its September 12, 2002 decision below, the Third Circuit Court of Appeals ignored the Alabama statutes and Alabama court decisions which hold that Haskell's fraudulent transfer, "alter ego," civil conspiracy, aiding and abetting are "direct" and "personal" claims which are the property of Haskell. The Third Circuit reasoned, without any principled analysis, that because "a debtor in possession is empowered to *avoid* a fraudulent transfer, for the benefit of all creditors" by virtue of Bankruptcy Code § 544(b), it necessarily follows that Bruno's, the debtor in possession, and the Bankruptcy Court, also have the power to "extinguish" or destroy creditors' claims against KKR (the Debtors' controlling shareholder) and its accomplices, without the creditors' consent and for no consideration. In its September 12, 2002 opinion, the Third Circuit fails to address the threshold questions: (1) Are Haskell's

claims "derivative claims" which belonged to the Debtors, prior to the commencement of the bankruptcy case? (2) Were Haskell's state-law claims for fraudulent transfer, alter ego, breach of fiduciary duty, conspiracy and aiding and abetting transformed into "property of the estate" by virtue of § 544(b) of the Bankruptcy Code upon filing of the Chapter 11 proceedings?

REASONS FOR GRANTING THE PETITION

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE QUESTIONS PRESENTED ARE OF GREAT PUBLIC IMPORTANCE.

Notwithstanding the lack of statutory justification, nondebtor releases and "extinguishment" provisions are becoming popular features of bankruptcy reorganization plans. Nearly every federal Court of Appeals has addressed the question, with conflicting results. The Second, Fourth and D.C. Circuits have held that such nondebtor release provisions bind all parties upon confirmation of the bankruptcy plan, regardless of whether the creditor consents to the release. *See, e.g., SEC v. Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285 (2d Cir. 1992); *Menard-Sanford v. Mabey (In re A.H. Robins Co, Inc.)*, 880 F.2d 694 (4th Cir. 1986); *In re AOV Industries, Inc.*, 792 F.2d 1140 (D.C. Cir. 1986). The Seventh Circuit has permitted nondebtor releases only as to creditors who vote for the plan and specifically consent to the releases. *See In re Specialty Equipment Co., Inc.*, 3 F.3d 1043 (7th Cir. 1993). The Fifth and Ninth Circuits have rejected releases of creditors' claims against nondebtors. *See, e.g., Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746 (5th Cir. 1995); *Resorts Int'l, Inc. v. Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394 (9th Cir. 1995). Prior to the September 12, 2002 decision below, the Third Circuit rejected nondebtor releases in *In re*

Continental Airlines, 203 F.3d 203 (3d Cir. 2000) ("*Continental Airlines II*"), after finding that the plan proponents had failed to show that the releases were fair and necessary to the reorganization. In this case, the lower courts justified the Debtors' attempt to release nondebtors by characterizing Haskell's claims as "derivative" or as property of the Debtors' estate. This characterization led to the dubious conclusion that Haskell's claims were then subject to "extinguishment" pursuant to the Debtor in Possession's § 544(b) avoidance powers.

Nondebtor releases are attractive to corporate insiders and controlling persons who would rather not file for bankruptcy themselves, but would nevertheless like to be discharged of their liabilities. In the wake of some of the largest bankruptcies in history, widespread corporate corruption, and accounting frauds, the bankruptcy bar's ability to engineer and obtain reorganization plans which include nondebtor releases obviously has developed great appeal to CEO's, controlling shareholders, officers and directors of troubled companies. *See, e.g.*, Meltzer, "Getting Out of Jail Free: Can the Bankruptcy Plan Process Be Used to Release Nondebtor Parties?", 71 Am. Bankr. L. J. 1 (1997); Brubaker, "Nondebtor Releases and Injunctions in Chapter 11: Revisiting Jurisdictional Precepts and the Forgotten Callaway v. Benton Case", 72 Am. Bankr. L. J. 1 (1998). The lack of any clear statutory authority for these extraordinary releases, combined with their proliferation, threatens any sense of accountability in the bankruptcy process.

II. THE THIRD CIRCUIT'S SEPTEMBER 12, 2002 DECISION IS IN CONFLICT WITH OTHER CIRCUITS' DECISIONS REGARDING WHETHER A TRUSTEE OR DEBTOR IN POSSESSION OWNS, AND HAS THE POWER TO RELEASE, CREDITORS' PERSONAL CLAIMS AGAINST NONDEBTORS.

The questions presented in this case touch primarily on four areas of bankruptcy law: the definition of "property of the estate", the distinction between creditors' personal claims and "derivative" claims, the nature and extent of a bankruptcy trustee's statutorily conferred "avoidance powers", and the limits of a bankruptcy court's power and authority to permanently enjoin creditors' claims against nondebtors. Here, the lower courts erroneously ruled that Haskell's fraudulent transfer, alter ego, conspiracy and aiding and abetting claims against nondebtors were "derivative" claims which were property of the debtors and that those claims could be "extinguished" pursuant to the debtor in possession's § 544(b) avoidance power. The Third Circuit's September 12, 2002 decision all but ignores Haskell's citations to contrary authority on these issues from sister circuits, and controlling decisions of this Court.

A. FRAUDULENT TRANSFER CLAIMS

The Third Circuit's decision in this case that Haskell's state law fraudulent transfer claims are "derivative" claims that are owned by or vested in the Debtors, and are "property of the estate", is in direct conflict with the Second Circuit's decision in *In re Colonial Realty Co.*, 980 F.2d 125 (2d Cir. 1992). In *Colonial Realty*, the Second Circuit Court of Appeals rigorously analyzed the Bankruptcy Code and held that pursuant to Sections 541 and 550 of the Bankruptcy Code, a fraudulently transferred

asset does not become "property of the estate" unless and until the trustee *avoids* the transfer under § 544(b) and *recovers* the asset under § 550:

> In accordance with 11 U.S.C. § 541(a)(1) (1988), the property of a bankruptcy estate includes (with exceptions not presently pertinent) "all legal or equitable interests of the debtor in property as of the commencement of the case"; and pursuant to 11 U.S.C. § 541(a)(3) (1988), the property of a bankruptcy estate also includes "[a]ny interest in property that the trustee recovers" under specified Bankruptcy Code provisions, including 11 U.S.C. § 550 (1988). Section 550 authorizes a trustee to recover transferred property for the benefit of the estate to the extent that a transfer is avoided, *inter alia*, as fraudulent under either 11 U.S.C. § 544 (1988) or § 548 (1988 & Supp. II 1990).
>
> As stated in [*In re*] *Saunders*: "If property that has been fraudulently transferred is included in the § 541(a)(1) definition of property of the estate, then § 541(a)(3) is rendered meaningless with respect to property recovered pursuant to fraudulent transfer actions." 101 B.R. at 305. Further, "the inclusion of property recovered by the trustee pursuant to his avoidance powers in a separate definitional subparagraph clearly reflects the congressional intent that such property is not to be considered property of the estate until it is recovered." Id. *Saunders* also pointed to potential complexities in the administration of bankruptcy estates that ensue from regarding fraudulently transferred property as part of the bankruptcy estate under § 541(a)(1) prior to its recovery. 101 B.R. at 305.

Compare In re MortgageAmerica, 714 F.2d 1266, 1275 (5th Cir. 1983) (holding that when a debtor is forced into

bankruptcy "it makes the most sense to consider the debtor as continuing to have a 'legal or equitable interest' in the property fraudulently transferred within the meaning of section 541(a)(1) of the Bankruptcy Code").

The Third Circuit had previously held that Section 544(b) of the Bankruptcy Code merely permits a trustee to *avoid* fraudulent transfers using creditors' state law claims where to do so would benefit the creditors. *See In re Cybergenics Corp.*, 226 F.3d 237, 244 (3d Cir. 2000) ("*Cybergenics I*") (holding that a sale of all of the debtor's assets did not include creditors' fraudulent transfer claims and did not bar the assertion of such claims by a creditors' committee for the benefit of creditors):

> As further evidence that the avoidance powers neither shift ownership of the fraudulent transfer action to the debtor in possession, nor are themselves a debtor's assets, we note that courts have limited a debtor's exercise of avoidance powers to circumstances in which such actions would in fact benefit the creditors, not the debtors themselves.

The Third Circuit's September 12, 2002 decision below does not acknowledge that the fraudulent transfer claims, alter ego claims, civil conspiracy claims, and aiding and abetting claims asserted in the Haskell action do not belong to the Debtors and are not property of the Debtors' bankruptcy estate. Can a debtor in possession (or a bankruptcy court) "extinguish" claims which the debtor does not own? The answer is "No".

The September 12, 2002 decision of the Third Circuit is in conflict with several decisions of other Circuits. For example, in *Kathy B. Enterprises, Inc. v. United States*, 779 F.2d 1413 (9th Cir. 1986), the Ninth Circuit Court of Appeals held that the debtor's discharge did not preclude

the IRS from asserting a fraudulent transfer claim against the recipient of a fraudulently transferred asset, stating:

> Section 524(e) of the Bankruptcy Code provides:
>
> > Except as provided in subsection (a)(3) of this section [dealing with claims against community property], discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for such debt.
>
> 11 U.S.C. § 524(e).
>
> > The language of this section is clear and appears to dispose of Kathy B.'s claims. But Kathy B. claims that this section applies only to cases in which "the other entity" had a direct contractual relationship with the creditor, such as guarantor of the discharged debt. It points out that there is no reference in the legislative history to a situation such as this one, where no link between the third party and the "other entity" exists other than that based on a state law invalidating fraudulent conveyances.
>
> The government's position is more persuasive. Section 16 of the old Bankruptcy Act provided:
>
> > The liability of a person who is a co-debtor with or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of a bankrupt.
>
> Ch. 541, 30 Stat. 544, 500 (1898).
>
> > When Congress passed the comprehensive Bankruptcy Code in 1978, it

> replaced this provision – which listed three specific exemptions from discharge – with expansive language denying "any other entity" a discharge of the debt. It is hard to view this change as anything but a legislative mandate further to constrict the effect of a discharge.
>
> Kathy B. cites no case authority in support of its position. The legislative history it relies on is ambiguous and taken out of context. . . . ***We see no reason to infer an exception to clear statutory language for the benefit of recipients of fraudulent conveyances***. [Emphasis supplied.]

Also see, e.g., *Johnson v. Home State Bank*, 501 U.S. 78, 84, 111 S.Ct. 2150, 2154, 115 L.Ed.2d 66 (1991) (holding "[t]he Court of Appeals thus erred in concluding that the discharge of petitioner's *personal liability* . . . constituted the complete termination of the Bank's *claim* against petitioner. Rather, a bankruptcy discharge extinguishes only one mode of enforcing a claim – namely, an action against the debtor *in personam*"); *FDIC v. Davis*, 733 F.2d 1083, 1085 (4th Cir. 1984) (holding that the FDIC was not precluded by debtor's discharge from asserting lien against fraudulently transferred property held by non-debtor third party); *Houston v. Edgeworth* (*Matter of Edgeworth*), 993 F.2d 51, 53 (5th Cir. 1993) ("A discharge in bankruptcy does not extinguish the debt itself . . . Section 524(e) specifies that the debt still exists. . . ."); *Moore, Owen, Thomas & Co. v. Coffey*, 992 F.2d 1439, 1449 (6th Cir. 1993) (holding debtor's discharge does not affect guarantor's obligation to creditor). These cases, and the plain language of § 524(e) itself, illustrate Congress's underlying premise in enacting § 524: although debts which are "discharged" or "extinguished" as a result of a debtor's bankruptcy or reorganization are unenforceable

against the debtor post-confirmation, such debts are not "discharged" or "extinguished" with respect to a nondebtor who was liable as a guarantor or otherwise prior to confirmation, and the nondebtor remains liable post-confirmation, with the same duties, obligations, and liabilities.

In factually similar cases, also ignored by the Third Circuit in its September 12, 2002 decision, a number of lower courts have held that where a trustee or debtor in possession fails or refuses to assert a claim to avoid a fraudulent transfer of assets, the creditors may proceed with their individual state law claims. *See, e.g., Klingman v. Levinson*, 158 B.R. 109, 113 (N.D.Ill. 1993):

> The Court adopts the analysis of [*In re*] *Colonial* [*Realty Co.*, 980 F.2d 125 (2d Cir. 1992)] and [*In re*] *Saunders*, [101 B.R. 303 (Bankr.N.D.Fla. 1989)] and holds that fraudulently transferred property does not become property of the bankruptcy estate until there has been a judicial determination that the property was fraudulently transferred.
>
> This holding should not be construed as suggesting that creditors may vie with the bankruptcy trustee for the right to pursue fraudulent conveyance actions. To the contrary, the commencement of bankruptcy gives the trustee the right to pursue fraudulently conveyed assets to the exclusion of all creditors. 11 U.S.C. § 546(a). However, ***the trustee's exclusive right to maintain a fraudulent conveyance cause of action expires and creditors may step in (or resume actions) when the trustee no longer has a viable cause of action***. *Kathy B. Enterprises, Inc. v. United States*, 779 F.2d 1413, 1415 (9th Cir. 1986) (IRS entitled to pursue collection action after bankruptcy closed); *Federal Deposit Insurance Corp.* [*v. Davis*], 733 F.2d 1083, 1085 (4th Cir. 1984) ("once a

> bankruptcy case has been closed, creditors having unavoided liens on fraudulently conveyed property can pursue their state law remedies independently of the trustee in bankruptcy"); *Dixon v. Bennett*, 72 Md. App. 620, 531 A.2d 1318, 1323-25 (1987) ("once a trustee's statutory time period has expired, an unsecured creditor can bring an action against a fraudulent transferee under state law provided the state statute of limitations has not yet expired"). [Emphasis supplied.]

Also see Sparano v. Southland Corp., 1995 WL 470267 (N.D.Ill. 1995), a case very similar to the case at bar, where the court permitted a creditor to assert fraudulent transfer claims, notwithstanding a court-approved plan of reorganization which purported to release fraudulent transfer claims, stating:

> As for Count VII [fraudulent conveyance], the officers and directors argue that any fraudulent conveyance claim based on the 1988 LBO became vested exclusively in Southland's estate during the 1990-91 bankruptcy proceedings and that the estate released those claims as part of the court-approved reorganization plan. The argument was persuasively rejected by then-Chief Judge Moran in *Klingman v. Levinson*, 158 B.R. 109, 113 n. 1 (N.D.Ill. 1993) ("a fraudulent transfer cause of action is not considered property of the estate since the avoidance of such a transfer is not a cause of action assertable by the debtor"). Judge Moran recognized that the commencement of a bankruptcy action gives the trustee the exclusive right to pursue fraudulently conveyed assets, but observed that this right "expires and creditors may step in (or resume actions) when the trustee no longer has a viable cause of action," id. at 113, and the trustee here no longer has one because

> the estate has released its claims for fraudulent conveyance.

Id. at *8.

During the bankruptcy proceedings below, the Debtors argued, without legal analysis or supporting authority, that upon the initial filing of the bankruptcy petition, Haskell and other creditors were automatically divested of their fraudulent transfer claims and alter ego claims and that such claims automatically became property of the debtors.[7] When *Cybergenics I* closed the door on that theory, the Delaware Bankruptcy Court and the Third Circuit Court of Appeals below came up with the notion that because the debtor in possession *could* have avoided a fraudulent transfer pursuant to § 544(b) for the benefit of the debtor's creditors, any fraudulent transfer claim is a "derivative" claim which is the property of the debtor and the bankruptcy estate. The Third Circuit's September 12, 2002 decision below reasons that because a debtor in possession is empowered to *pursue* state law fraudulent transfer claims for the benefit of the estate's creditors, it necessarily follows that the debtor in possession must also have the power to "extinguish" those claims for no consideration and without the consent of the affected creditors, for the benefit of its insiders and recipients of the fraudulent transfers. The Delaware Bankruptcy

---

[7] The Third Circuit debunked this theory in *In re Cybergenics*, 226 F.3d 237 (3d Cir. 2000) (*"Cybergenics I"*), holding that state law fraudulent transfer claims did not belong to a debtor, despite the filing of a bankruptcy petition:

> [W]e reach the inescapable conclusion that ***the fraudulent transfer claims, which state law provided to Cybergenics' creditors, were never assets of Cybergenics, and this conclusion in not altered by the fact that a debtor in possession is empowered to pursue those fraudulent transfer claims for the benefit of all creditors***. [Emphasis supplied.]

Court's December 7, 2000 Order and the Third Circuit's September 12, 2002 opinion below graft onto the Bankruptcy Code the notion that if the Bankruptcy Court determines that a creditor's claim *could* have been asserted by a trustee for the benefit of creditors generally, then the creditor's claim is the property of the bankruptcy estate so as to permit the debtor's plan of reorganization to "extinguish the creditor's claim" against nondebtor third parties.

The Third Circuit cites no statutory authority for its December 12, 2002 holding that the power to "avoid transfers" conferred by § 544(b) also confers upon a trustee or debtor in possession the power to release nondebtors from their liabilities to creditors. Sections 541 and 544(b) of the Bankruptcy Code contain no such provision, and should not be so construed. The December 12, 2002 decision of the Third Circuit result essentially transforms § 544(b) from a sword (*i.e.*, the power to bring an action to avoid a fraudulent transfer of assets, in order to benefit creditors of the estate) into a shield to protect nondebtor defendants against creditors' rightful claims.

B. ALTER EGO CLAIMS

The "alter ego" or "veil-piercing" doctrine imposes liability on individuals who use the corporate form merely as an instrumentality to conduct their personal business. Such liability arises not from fraud or injustice perpetrated on the corporation, but from fraud practiced on third parties dealing with the corporation. Alabama law recognizes a creditor's right to assert alter ego claims against a corporation's controlling shareholders. *See, e.g.*, *R. E. Pilkerton Elec., Inc. v. Westinghouse Elec. Supply Co., Inc.*, 444 So. 2d 855 (Ala. 1984).

The Third Circuit's September 12, 2002 decision below is contrary to decisions of the Eighth, Ninth and Sixth Circuits.

In *In re Ozark Restaurant Equipment Co., Inc.*, 816 F.2d 1222, 1225-26 (8th Cir. 1987), the Eighth Circuit held that a bankruptcy trustee lacks standing to assert creditors' alter ego claims against nondebtors who controlled the debtor corporation:

> [W]henever a cause of action 'belongs' to the debtor corporation, the trustee has the authority to pursue it in bankruptcy proceedings. Where, however, 'the applicable state law makes such obligations or liabilities run to the corporate creditors personally, rather than to the corporation, such rights of action are not assets of the estate under Section 541(a) that are enforceable by the trustee. . . . In this respect, we recognize that '[g]enerally, the corporate veil is never pierced for the benefit of the corporation or its shareholders.'
>
> * * *
>
> Additionally, the trustee maintains that section 544(b), which allows a trustee to avoid certain transfers of the debtor which are voidable under applicable law by a creditor holding an unsecured claim, see id. § 544(b), also gives the trustee standing to pursue an alter ego action for the benefit of all creditors.
>
> * * *
>
> Admittedly, a trustee's rights and powers under Section 544 are extensive. We do not believe, however, that they encompass the ability to litigate claims, such as the instant alter ego cause of action, on behalf of the debtor corporation's creditors. [Citations omitted.]

See also, In re RCS Engineered Products Co., Inc., 102 F.3d 223 (6th Cir. 1996) (holding that a trustee lacks the power to assert a state law alter ego claim based on Michigan law); *Williams v. California First Bank*, 859 F.2d 664 (9th Cir. 1988) (holding that trustee lacks the power to assert

creditor's state law alter ego claim). *But see Koch Refining v. Farmers Union Cent. Exchange, Inc.*, 831 F.2d 1339 (7th Cir. 1987) (holding that under principles of "equitable subordination" the trustee has standing to assert creditors' state law alter ego claims); *In re S.I. Acquisition, Inc.*, 817 F.2d 1142 (5th Cir. 1987) (holding that nothing in state law prevents a trustee from asserting creditors' alter ego claims).

In its September 12, 2002 opinion below, the Third Circuit Court of Appeals fails to distinguish, address or explain away the court decisions cited above, and does not even address the interplay between state law and Bankruptcy Code. *See, e.g., Raleigh v. Illinois Dept. of Revenue*, 530 U.S. 15, 20 (2000) ("The 'basic federal rule' in bankruptcy is that state law governs the substance of claims . . . ."); *Butner v. United States*, 440 U.S. 48 (1979) (holding that state law generally determines property rights in assets of a bankrupt's estate); *Sender v. Simon*, 84 F.3d 1299, 1305 (10th Cir. 1996) ("[T]o satisfy the requirements of § 541, the cause of action asserted by the trustee must belong to the debtor entity itself, not the debtor's creditors individually. State law provides the guidelines for determining whether a cause of action belongs to the debtor and therefore becomes property of the estate.") Instead, the Third Circuit's September 12 opinion simply ignores the issue.

C. CLAIMS FOR CIVIL CONSPIRACY AND AIDING AND ABETTING

There is no question that Alabama law provides a creditor with a cause of action against those who conspire with his debtor to fraudulently transfer assets. *See, e.g., A.T. Stephens Enters. v. Johns*, 757 So. 2d 416, 419 (Ala. 2000):

> The first issue dealing with a question of law is whether Alabama recognizes a cause of action for conspiracy to defraud a creditor. This Court has

> stated that a civil conspiracy is a combination of two or more persons acting to accomplish an unlawful end or to accomplish a lawful end by unlawful means. Furthermore, this Court has a number of times discussed the claim of conspiracy to defraud. Nothing in the statutes or case law this Court has been shown would prohibit a creditor of one of the conspirators from bringing an action based upon this cause of action.

Contrary to the September 12, 2002 decision of the Third Circuit, a number of courts have held that a bankruptcy trustee lacks the power to *assert* a creditor's state law claims for conspiracy to commit a fraudulent transfer or for aiding and abetting such a transfer. *See In re Hamilton Taft & Co.*, 176 B.R. 895 (Bankr.N.D.Cal. 1995):

> California courts [like Alabama courts] permit a *creditor* to recover civil damages from those who conspire to transfer property of a debtor to hinder, delay or defraud creditors. A debtor's bankruptcy trustee, however, is not authorized to pursue every action that creditors of the debtor might pursue. A trustee's only authority to assert creditor's state law causes of action related to fraudulent conveyances is found in section 544(b) of the Bankruptcy Code. That section only permits the trustee to *avoid* a fraudulent transfer.
>
> * * *
>
> In short, [a] Trustee's only authority to bring state-law claims of creditors is section 544(b), and section 544(b) does not authorize [the] Trustee to assert a claim for aiding and abetting a fraudulent transfer. (Emphasis in original).

If a trustee or debtor in possession lacks the power to assert creditors' civil conspiracy or aiding and abetting claims, it surely follows that a trustee or debtor in possession cannot "extinguish" such claims.

III. THIS COURT SHOULD GRANT CERTIORARI IN THE EXERCISE OF ITS SUPERVISORY POWER.

According to this Court's Rule 10(a), certiorari may be granted where the lower court "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power". This case is of concern because bankruptcy courts continue to uphold reorganization plans with nondebtor release provisions, despite the lack of any clear basis in the Bankruptcy Code for these releases. *See, e.g., In re Continental Airlines*, 203 F.3d 203 (3d Cir. 2000):

> [G]ranting permanent injunctions to protect non-debtor parties on the basis of theoretical identity of interest alone would turn bankruptcy principles on their head. Nothing in the Bankruptcy Code can be construed to establish such extraordinary protection for non-debtor parties.

Id. at 217.

> We also note, with some concern, that the Bankruptcy Court apparently never examined its jurisdiction to release and permanently enjoin Plaintiffs' claims against non-debtors. Although bankruptcy subject matter jurisdiction can extend to matters between non-debtor third parties affecting the debtor or the bankruptcy estate, a court cannot simply presume it has jurisdiction in a bankruptcy case to permanently enjoin third-party class actions against non-debtors. We must remain mindful that bankruptcy jurisdiction is limited, as is the explicit grant of authority to bankruptcy courts. [Internal citations omitted.]

Id. at 214, n.12.

Moreover, the "extinguishment" of creditors' claims against nondebtors is not authorized, defined, or even mentioned, in the Bankruptcy Code. Rather, it appears (at least in this case) that "extinguishing" creditors' claims against nondebtors is some sort of home-grown remedy for nondebtors who would like to discharged from their liabilities without filing for bankruptcy. *Ad hoc* embellishment of the Bankruptcy Code, however, is not the function of the federal courts:

> [T]he scope of a bankruptcy court's equitable power must be understood in the light of the principle of bankruptcy law discussed already, that the validity of a claim is generally a function of underlying substantive law. Bankruptcy courts are not authorized in the name of equity to make wholesale substitution of underlying law controlling the validity of creditors' entitlements, but are limited to what the Bankruptcy Code itself provides.

Raleigh v. Illinois Dept. of Revenue, 530 U.S. at 24-25 (2000).

Secondly, the lower courts' tactic of simply ignoring contrary decisions and valid and relevant legal arguments of a party, without even attempting to distinguish or refute them, is a disservice not only to the litigants, but to the legal system.

The decision of the Third Circuit below simply ignored an erroneous finding of fact by the Bankruptcy Court and the cases cited by Haskell, and failed to acknowledge the fact that the December 7 Order of the Bankruptcy Court sanctions Haskell for having attempted to prove that his claims were personal, not the property of the estate, even though the Bankruptcy Court had on January 20, 2000 ruled that Haskell had the *right* to do so.

The plain fact of the matter is that neither of the courts below decided this case in a manner consistent with the law or the facts.

CONCLUSION

The instant case presents issues of great public importance. Bankruptcy practitioners and bankruptcy courts continue to push the envelope of the Bankruptcy Code by approving the release of nondebtors or "extinguishing" such claims, notwithstanding the lack of any statutory authority for such releases (and, indeed, in spite of the substantial authority *against* such releases). This Court should grant certiorari to insure that the Bankruptcy Courts act within the confines of the Bankruptcy Code and to insure that nondebtor releases do not become commonplace.

Respectfully submitted,

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PRECEDENTIAL

Filed September 12, 2002

UNITED STATES COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 01-1462

IN RE: PWS HOLDING CORPORATION;
BRUNO'S, INC.;
FOOD MAX OF MISSISSIPPI, INC.;
A.F. STORES, INC.;
BR AIR, INC.;
FOOD MAX OF GEORGIA, INC.;
FOOD MAX OF TENNESSEE, INC.;
FOODMAX, INC.;
LAKESHORE FOODS, INC.;
BRUNO'S FOOD STORES, INC.;
GEORGIA SALES COMPANY;
SSS ENTERPRISE, INC.,

Debtors,

Wyatt R. Haskell, individually and on
behalf of others similarly situated,

Appellant

On Appeal from the United States District Court
for the District of Delaware Exercising Original
Jurisdiction in a Bankruptcy Case

District Court Judge: The Honorable Sue L. Robinson
(D.C. No: 98-00212 through 98-00223)

Argued on April 1, 2002.

Before: SLOVITER, FUENTES, and MICHEL,*
Circuit Judges.

(Opinion Filed: September 12, 2002)

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* Hon. Paul R. Michel, United States Court of Appeals for the Federal Circuit, sitting by designation.

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OPINION OF THE COURT

FUENTES, Circuit Judge.

Wyatt R. Haskell appeals from the order of the District Court enforcing its previous confirmation order ("Confirmation Order") of a bankruptcy reorganization plan ("Reorganization Plan") for Bruno's, Inc., an Alabama-based company that operates a chain of supermarkets in the southeastern United States. The order specifically enjoins the prosecution of certain fraudulent transfer claims asserted by Haskell in Alabama state court. The District Court further ordered that, as a result of Haskell's violation of the Confirmation Order, he is to pay the costs associated with obtaining the enforcement order. As a holder of $2.45 million in Bruno's subordinated notes, Haskell argues that the Reorganization Plan and the Confirmation Order do not bar him from pursuing direct fraudulent transfer claims under the Alabama Uniform Fraudulent Transfer Act ("AUFTA"), Ala. Code, § 8-9A-1, et. seq.

Because the fraudulent transfer claims asserted by Haskell in Alabama state court were extinguished by the Reorganization Plan and Confirmation Order, and because Haskell continued to prosecute the Alabama action in violation of the Confirmation Order, we will affirm the District Court's enforcement order in all respects.

I.

Bruno's operates a chain of about 200 supermarkets in the southeastern United States. In 1995, affiliates of Kohlberg, Kravis, Roberts & Co., LP ("KKR") acquired an 83.33% interest in Bruno's in a leveraged recapitalization, which was financed by an equity contribution of $250 million by KKR, a revolving credit and term loan facility provided by a group of banks (the "Banks"), and the issuance by Bruno's of $400 million in notes due in 2005 pursuant to an indenture. The indenture provides that the noteholders' claims are fully subordinated to the payment in full of the claims of the senior lenders. The total financing of the leveraged recapitalization was approximately $1.25 billion.

From November 1997 through March 1999, Haskell purchased $2.45 million in principal amount of subordinated notes, at an average cost of 20 to 22 cents on the dollar, or $490,000 to $539,000 in the aggregate.

On February 2, 1997, facing difficulty meeting payment obligations from the recapitalization and in paying its suppliers and other creditors, Bruno's and its affiliates[1] (collectively "Debtors") filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. As of that filing date, Bruno's owed approximately $462 million to the Banks, $135 million to trade vendors, suppliers, and other secured creditors, and $421 million on the subordinated

[1] The affiliates are PWS Holding Corp., Food Max of Mississippi, Inc., A.F. Food Stores, Inc., BR Air, Inc., Food Max of Georgia, Inc., Food Max of Tennessee, Inc., FoodMax, Inc., Lakeshore Foods, Inc., Bruno's Food Stores, Inc., Georgia Sales Co., and SSS Enterprise, Inc.

notes. In February 1998, the Bankruptcy Trustee appointed a nine-member "Official Unsecured Creditor's Committee" (the "Committee"), which comprised four representatives of the Banks, three representatives of the trade vendors, and two representatives of the subordinated noteholders. During the spring of 1999, the Committee and subgroups of the Committee convened several times to develop the Reorganization Plan for the Debtors.

In March 1999, the Debtors' attorneys determined that legal claims arising from the leveraged recapitalization, primarily fraudulent transfer claims, were not viable against any of its participants. Although the Committee initially voted to preserve these causes of action in the plan, it reversed its position in May 1999 and, with the support of the trade vendor representatives and the Banks, voted to support the plan releasing the claims. Haskell, W.R. Huff Asset Management Co., L.L.C. ("Huff"), a holder of $290 million in Bruno's subordinated notes, and HSBC Bank USA ("HSBC"), the indenture trustee for the subordinated notes, objected to these releases and successfully moved for the appointment of an independent examiner to evaluate the claims. The examiner found, however, that the claims were "not promising," were "limited and speculative," and that "significant defenses" were available to each of the principal participants, the former shareholders, the Banks, the subordinated noteholders, and KKR in the recapitalization. The examiner thus concluded that the fraudulent transfer claims were "extremely difficult to justify" in the face of "the multiple legal and factual obstacles to any substantial fraudulent transfer or illegal distribution recovery by the Debtors." Accordingly, under the Reorganization Plan, these legal claims were extinguished and the potential

targets of any prosecution of these claims were, in effect, released.

On August 5, 1999, Haskell commenced an action in Alabama state court ("Haskell Alabama Action") on behalf of himself and similarly situated noteholders, asserting claims under the AUFTA, alter-ego claims, conspiracy claims, and breach of fiduciary duty claims. The defendants in the Haskell Alabama Action consist primarily of participants in the leveraged recapitalization, including co-appellee The Chase Manhattan Bank ("Chase"), which served as administrative agent for the senior lenders to Bruno's in the leveraged recapitalization. In response, Bruno's invoked the automatic stay under 11 U.S.C. § 362 of the Bankruptcy Code, and the prosecution of the Haskell Alabama Action was suspended.

The final Reorganization Plan explicitly makes reference to the Haskell Alabama Action, providing:

> 9.3 Claims Extinguished.
>
> (a) As of the Effective Date, any and all avoidance claims accruing to the Debtors and Debtors in Possession under sections 502(d), 544, 545, 547, 548, 549, 550, and 551 of the Bankruptcy Code, including, without limitation, all of the claims that are asserted in the Haskell Alabama Action and the Huff Alabama Action, shall be extinguished whether or not then pending.
>
> (b) As of the Effective Date, any and all alter-ego or derivative claims accruing to the Debtors and Debtors in Possession, including, without limitation, all of the claims that are asserted or could be asserted in the Haskell Alabama Action and the Huff Alabama Action, shall be extinguished whether or not then pending.

App. IV, at 773 (emphasis added). Haskell, together with Huff and HSBC, objected to the confirmation of the plan, specifically opposing the plan's release and extinguishment provisions. However, after a three-day hearing, the District Court approved the Debtors' Reorganization Plan and issued the Confirmation Order on December 30, 1999. Making specific reference to the Haskell Alabama Action and creditors' claims against nondebtor third parties, Paragraphs 50, 51, and 52 of the District Court's Confirmation Order provide:

> 50. As of the Effective Date, any and all avoidance claims owned by or vested in the Debtors and Debtors in Possession under sections 502(d), 544, 545, 547, 548, 549, 550 and 551 of the Bankruptcy Code, including, without limitation, all of the avoidance claims that are owned by or vested in the Debtors and Debtors in Possession pursuant to the Bankruptcy Code and applicable provisions of law and that are asserted or could be asserted in the Haskell Alabama Action and the Huff Alabama Action, shall be extinguished whether or not then pending.
>
> 51. As of the Effective Date, any and all alter-ego or derivative claims owned by or vested in the Debtors and Debtors in Possession, including, without limitation, all of the alter-ego or derivative claims that are owned by or vested in the Debtors and Debtors in Possession pursuant to the Bankruptcy Code and applicable provisions of law and that are asserted or could be asserted in the Haskell Alabama Action and the Huff Alabama Action, shall be extinguished whether or not then pending.
>
> 52. Nothing contained in paragraphs 50 or 51 of this Confirmation Order or in Sections 9.3(a) and

> 9.3(b) of the Plan shall be construed to extinguish, limit or bar any direct, personal and nonderivative claim which may be asserted against nondebtor third parties by creditors in their individual capacity or for the benefit of other similarly situated creditors; provided, however, that, notwithstanding the foregoing, creditors may not assert against nondebtor third parties any claims that are owned by or vested in the Debtors and Debtors in Possession and extinguished pursuant to Sections 9.3(a) and 9.3(b) of the Plan (as such Section is incorporated in paragraphs 50 and 51 of this Confirmation Order).

App. VIII, at 2027-28 (emphasis added). The clear language of the Confirmation Order specifically provides that the fraudulent transfer claims asserted in the Haskell Alabama Action are extinguished pursuant to Section 9.3 of the Reorganization Plan and cannot be asserted by creditors against third parties. Further, Paragraph 54 of the Confirmation Order permanently enjoins:

> all entities who have held, hold or may hold Claims against or Equity Interests in any or all of the Debtors from . . . commencing or continuing in any manner any action or other proceeding of any kind with respect to any claims and Causes of Action that are extinguished or released pursuant to the Plan or this Confirmation Order, including, without limitation, the claims extinguished pursuant to Section 9.3 of the Plan. . . .

App. VIII, at 2029.

Huff and HSBC appealed from the District Court's order confirming the Reorganization Plan, challenging three separate releases of legal claims included in the plan.

Haskell did not join in that appeal. On September 18, 2000, we affirmed the District Court's Confirmation Order in In re PWS Holding Corp., 228 F.3d 224 (3d Cir. 2000).[2]

On January 10, 2000, Haskell moved for an order to alter or amend the Confirmation Order so as to require deletion of the extinguishment and injunctive provisions pertaining to the claims asserted in the Haskell Alabama Action. At a hearing on January 20, 2000, the District Court denied Haskell's motion to alter or amend. Because Haskell then resumed the prosecution of the Haskell Alabama Action, the Debtors filed a motion on April 3, 2000 to enforce the Confirmation Order and specifically to enjoin Haskell's prosecution of extinguished claims. On April 26, 2000, Haskell filed an amended and restated complaint in the Haskell Alabama Action. The restated complaint alleges seven counts, including four premised upon the argument

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[2] In PWS Holding Corp., we observed that the District Court concluded that the claims were extinguished for the following three reasons:

> First, [the District Court] was persuaded by the Examiner's conclusion that there was a low likelihood of recovery on the claims. . . . Second, the Court concluded that the potential cost to the estate of prosecuting the action and defending and paying indemnification claims, cross claims, and counterclaims arising out of the prosecution was high. Third, the Court believed that there was some likelihood that the Banks and the subordinate noteholders, as participants in the leveraged recapitalization, would be estopped from recovering on the claims.

228 F.3d at 239. We ultimately found that "[t]he Examiner's and the District Court's conclusions that the claims were unlikely to succeed and were potentially costly to pursue are legally and factually supported." Id. at 242.

that the leveraged recapitalization was a fraudulent transfer under Alabama state law.[3]

On December 7, 2000, the District Court granted the Debtors' motion to enforce the Confirmation Order of December 30, 1999 and to enjoin the prosecution in the Haskell Alabama Action of the four counts premised upon Haskell's fraudulent transfer claims. The District Court further ordered that Haskell pay the costs, including reasonable attorneys' fees, associated with that proceeding.

Haskell timely appeals from the December 7, 2000 order of the District Court.

II.

The District Court had jurisdiction to hear and determine the Debtors' motion to enforce the Confirmation Order pursuant to 28 U.S.C. § 1334. We exercise jurisdiction under 28 U.S.C. § 1291. Although we review a district court's factual findings only for clear error, we exercise plenary review over any legal determinations. Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., Inc., 267 F.3d 340, 346 (3d Cir. 2001); In re O'Dowd, 233 F.3d 197, 201-02 (3d Cir. 2000).

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[3] Count I of the restated complaint alleges fraudulent transfer claims under the AUFTA. Count IV claims that the defendants breached their fiduciary duties to the subordinated noteholders by approving the leveraged recapitalization. Count V alleges that the defendants conspired to cause Bruno's to make fraudulent transfers. Finally, Count VI asserts that the defendants joined and rendered substantial assistance in causing Bruno's to violate the AUFTA by making fraudulent transfers.

III.

Fraudulent conveyance law aims "to make available to creditors those assets of the debtor that are rightfully a part of the bankruptcy estate, even if they have been transferred away." Buncher Co. v. Official Comm. of Unsecured Creditors of GenFarm Ltd. P'ship IV, 229 F.3d 245, 250 (3d Cir. 2000) (citing In re Cybergenics Corp., 226 F.3d 237, 241-42 (3d Cir. 2000)). The Uniform Fraudulent Transfer Act, as adopted in Alabama, provides that the transfer of an asset or an interest in an asset is fraudulent as to a creditor if (1) "the debtor made the transfer without receiving a reasonably equivalent value in exchange for the transfer" and (2) the debtor "[w]as engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction" or "[i]ntended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due." Ala. Code 1975, § 8-9A-4. Among the remedies that the AUFTA affords creditors is the "[a]voidance of the transfer to the extent necessary to satisfy the creditor's claim." Ala. Code 1975, § 8-9A-7.

Both the Reorganization Plan and the Confirmation Order specifically identify "all avoidance claims" asserted in the "Haskell Alabama Action," such as those available under the AUFTA, as "extinguished." Haskell points out, however, that the AUFTA provides a direct right of action to creditors, and not to the grantors of a fraudulent conveyance.[4]

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[4] The following are the relevant provisions of the AUFTA that describe a creditor's remedies:

(Continued on following page)

Because the AUFTA claims do not belong to Bruno's bankruptcy estate, Haskell argues that the extinguishment provisions in the Reorganization Plan and Confirmation Order do not bar him from prosecuting fraudulent transfer claims in the Haskell Alabama Action. The fatal flaw in Haskell's argument, however, is that it fails to consider properly the interplay between claims under the AUFTA and the Bankruptcy Code.

The relevant provision of the Bankruptcy Code in this case is 11 U.S.C. § 544(b). Section 544(b) provides that, upon commencement of a case under the Bankruptcy Code, a trustee or debtor in possession "may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is

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§ 8-9A-7. Remedies of creditors.

(a) In an action for relief against a transfer under this chapter, the remedies available to creditors, subject to the limitations in Section 8-9A-8, include:

(1) Avoidance of the transfer to the extent necessary to satisfy the creditor's claim. . . .

§ 8-9A-8 Defenses, liability, and protection of transferee.

. . .

(b) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under Section 8-9A-7(a)(1), the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection (c), or the amount necessary to satisfy the creditor's claim, whichever is less, or judgment for conveyance of the asset transferred. The judgment may be entered against:

(1) The first transferee of the asset or the person for whose benefit the transfer was made. . . .

Ala. Code 1975, §§ 8-9A-7 and 8-9A-8.

allowable" under the Bankruptcy Code.[5] 11 U.S.C. § 544(b). In other words, § 544(b) places the debtor in possession in the shoes of its creditors, giving it the right to prosecute individual creditors' fraudulent transfer claims for the benefit of the bankruptcy estate. This provision of the Bankruptcy Code is consistent with its objective of equitable distribution. See N.L.R.B. v. Martin Arsham Sewing Co., 873 F.2d 884, 888 (6th Cir. 1989) (noting that "[t]o allow a creditor of the bankrupt to pursue his remedy against third parties on a fraudulent transfer theory would undermine the Bankruptcy Code policy of equitable distribution by allowing the creditor 'to push its way to the front of the line of creditors)'" (quoting In re Cent. Heating & Air Conditioning, Inc., 64 B.R. 733, 737 (N.D. Ohio 1986)); see also Moore v. Bay, 284 U.S. 4, 5 (1931) (observing that what is recovered for benefit of bankrupt's estate is to be distributed in equal parts among allowed unsecured claims that lack priority).

Haskell contends that he has the right to assert his fraudulent transfer claims despite the language in § 544(b). He frames the issue in terms of ownership, focusing upon whether the fraudulent transfer claims belong to the Debtors. He makes reference to our previous decision in In re Cybergenics Corp., 226 F.3d 237 (3d Cir. 2000), in which we stated, "The fact that section 544(b) authorizes a debtor in possession . . . to avoid a transfer

[5] Although § 544(b) does not make reference to the "debtor in possession," the Bankruptcy Code generally gives the "debtor in possession" the powers and duties of a trustee. 11 U.S.C. § 1107(a). Thus, the two terms are "essentially interchangeable." In re Cybergenics Corporation, 226 F.3d 237, 243 (3d Cir. 2000).

using a creditor's fraudulent transfer action does not mean that the fraudulent transfer action is actually an asset of the debtor in possession. . . . " Id. at 243. Since creditors' actions under the AUFTA are not assets belonging to the Debtors, as Cybergenics makes clear, Haskell reasons that they are direct, non-derivative claims and, thus, unaffected by the extinguishment provisions in the Reorganization Plan and Confirmation Order. A closer analysis of our decision in Cybergenics demonstrates the flaws in Haskell's argument.

In Cybergenics, the debtor in possession, Cybergenics Corp., had sold all of its assets to a third party after filing for bankruptcy. Id. at 239. Subsequent to that, a group of Cybergenics' unsecured creditors sought leave from the Bankruptcy Court to bring a fraudulent transfer action on behalf of the bankruptcy estate.[6] Id. at 240. Those named as defendants in the creditors' suit argued that the creditors could not bring the action because any fraudulent transfer claims had been transferred in Cybergenics' asset sale. Id. Agreeing that such claims had been sold in the asset sale, the District Court dismissed the creditors' complaint for lack of subject matter jurisdiction under

[6] We note that the creditors in Cybergenics sought to bring a fraudulent transfer action under § 544(b) on behalf of the bankruptcy estate, whereas, in this case, Haskell seeks to bring his claims directly under the AUFTA, not derivatively through the debtor's power to assert fraudulent transfer claims under § 544(b). After the Supreme Court's holding that only a trustee or debtor-in-possession is empowered to invoke § 506(c) of the Bankruptcy Code in Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 9 (2000), there is some doubt as to whether a creditor can act derivatively in the debtor's stead to invoke § 544(b). However, because Haskell does not seek to invoke § 544(b), we are not confronted by that issue in this case.

Federal Rule of Civil Procedure 12(b)(1). Id. at 240-41. We reversed the dismissal, holding that the fraudulent transfer claim was never an asset of Cybergenics, the debtor in possession. Id. at 245. Expounding on the debtor's power to avoid fraudulent transfers, we explained:

> The power to avoid the debtor's prepetition transfers and obligations to maximize the bankruptcy estate for the benefit of creditors has been called a "legal fiction" by one court. It puts the debtor in possession "in the overshoes" of a creditor. This attribute is no more an asset of Cybergenics as debtor in possession than it would be a personal asset of a trustee, had one been appointed in this case. Much like a public official has certain powers upon taking office as a means to carry out the functions bestowed by virtue of the office or public trust, the debtor in possession is similarly endowed to bring certain claims on behalf of, and for the benefit of, all creditors.

Cybergenics, 226 F.3d at 243-44 (internal citations omitted).

In arguing that his claims as a noteholder were not extinguished under the Reorganization Plan and Confirmation Order, Haskell fixates upon our conclusion in Cybergenics that fraudulent transfer claims do not constitute assets of the debtor in possession. In doing so, however, he neglects to consider the well-established rule under § 544(b) that we reaffirmed in Cybergenics, namely, that "a debtor in possession is empowered to pursue . . . fraudulent transfer claims for the benefit of all creditors." Id. at 245. Unlike in Cybergenics, the debtor in possession in this case, after thoroughly investigating and evaluating the potential fraudulent transfer claims, explicitly extinguished all such claims in its Reorganization Plan. The District confirmed

the Reorganization Plan in its December 7, 1999 order, which we then affirmed in PWS Holding Corp., 228 F.3d at 250. Much as a party might decide to resolve a claim by reaching an out-of-court settlement, Bruno's resolved the fraudulent transfer claims here by extinguishing them. In contrast, the debtor in Cybergenics merely completed a sale of its assets. It did not exercise its power under § 544(b) to resolve potential fraudulent transfer claims, as did the debtor in this case.

Haskell had the opportunity to contest the extinguishment of the fraudulent transfer claims, but his objections were overruled by the District Court through its Confirmation Order, from which he did not file an appeal. Because Bruno's validly and effectively extinguished all potential fraudulent transfer claims arising from the leveraged recapitalization, Haskell is precluded from now prosecuting those claims in Alabama state court. They have been resolved.

Accordingly, we will affirm the District Court's order enforcing its previous Confirmation Order and enjoining Haskell from continuing to prosecute the AUFTA-related claims asserted in the Haskell Alabama Action. Because we agree with the District Court that Haskell violated the Confirmation Order, we will also affirm the District Court's order that he pay the costs associated with obtaining the enforcement order.

IV.

For the foregoing reasons, we will affirm the order of the District Court in all respects.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-1462

IN RE: PWS HOLDING CORPORATION;
BRUNO'S, INC.;
FOOD MAX OF MISSISSIPPI, INC.;
A.F. STORES, INC.;
BR AIR, INC.;
FOOD MAX OF GEORGIA, INC.;
FOOD MAX OF TENNESSEE, INC.;
FOODMAX, INC.;
LAKESHORE FOODS, INC.;
BRUNO'S FOOD STORES, INC.;
GEORGIA SALES COMPANY;
SSS ENTERPRISE, INC.,

Debtors,

WYATT R. HASKELL, individually and on behalf of others similarly situated,

Appellant.

On Appeal from the United States District Court
for the District of Delaware

District Court Judge: The Honorable Sue L. Robinson
(D.C. No: 98-cv-00212)

Argued on April 1, 2002

Before: SLOVITER, FUENTES, and MICHEL*,
Circuit Judges.

JUDGMENT

This cause came to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel on April 1, 2002.

On consideration whereof, it is now here ORDERED and ADJUDGED by this Court that the order of the said District Court entered on December 7, 2000, be, and the same is, hereby AFFIRMED. Costs taxed against Appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron

Clerk

Dated: September 12, 2002

Certified as a true copy and issued in lieu of a formal mandate on 11/27/02

Teste: /s/ Kathleen Brouwer

Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit.

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* Hon. Paul R. Michel, United States Court of Appeals for the Federal Circuit, sitting by designation.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11 Case Nos.
PWS HOLDING CORPORATION, BRUNO'S, INC., et al.	)	98-212-SLR through 98-223-SLR
	)	(Jointly Administered)
Debtors.	)	

MEMORANDUM ORDER

At Wilmington this 7th day of December, 2000, having reviewed debtors' motion to enforce the confirmation order of December 30, 1999 and to specifically enjoin the prosecution of certain claims asserted by Wyatt R. Haskell in the Haskell Amended and Restated Complaint currently pending in the United States Bankruptcy Court for the Northern District of Alabama ("the Haskell Restated Complaint");

IT IS ORDERED that said motion (D.I. 2440) is granted, for the reasons that follow:

1. There is no dispute that the release of potential fraudulent transfer claims arising out of that certain recapitalization, as provided in the debtors' second amended joint plan of reorganization under Chapter 11 of the Bankruptcy Code ("the Plan"), did "not cover any direct, personal, nonderivative claims held by creditors against nondebtor third parties." *In re: PWS Holdings Corporation*, 228 F.3d 224, 235 (3d Cir. 2000).

2. The Plan, however, did provide for the extinguishment of all other potential fraudulent transfer claims arising out of the recapitalization as being in the best

interests of all creditors, pursuant to 11 U.S.C. § 1123. Although the Third Circuit, in its decision affirming the confirmation order and the Plan, recognized that "a reorganziation plan can [not] transfer assets whenever the Trustee or the Debtor-in-Possession judges that to do so would be in the best interest of the reorganized entity," *id.* at 242, nevertheless, the Court upheld the extinguishment of these claims. Specifically, the Third Circuit concluded that the objecting parties[1] failed to demonstrate that releasing the potential fraudulent transfer claims against junior equity violated the absolute priority rule "in the particular circumstance in which the estate's claims are of only marginal viability and could be costly for the reorganized entity to pursue." *Id.* at 242.

3. Mr. Haskell argues that he should not be enjoined from litigating the claims of the Haskell Restated Complaint because "state law fraudulent transfer claims against nondebtor third parties are not assets of the debtors-in-possession, but instead are the property of creditors." Haskell's November 13, 2000 letter, citing *In re Cybergenics*, 226 F.3d 237 (3d Cir. 2000).

4. The Third Circuit recognized in this case that

> [f]raudulent transfer actions may be brought by a debtor-in-possession under § 548 of the Code, see 11 U.S.C. § 548, and, pursuant to § 544(b) of the Code, under applicable state fraudulent transfer statutes, see 11 U.S.C. § 544(b). Because the recapitalization occurred approximately two and

[1] Mr. Haskell participated as an objecting party in the district court proceedings; he did not appeal the confirmation order.

> one-half years before the commencement of the Chapter 11 cases, § 548 is inapplicable, and hence any fraudulent transfer claims would have to be brought under state law through § 544(b) of the Code.

228 F.3d at 233 n.6.

5. As further explained by the Third Circuit in *In re Cybergenics*, § 544(b)

> authorizes the avoidance of "any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding as [allowable] unsecured claim." 11 U.S.C. § 544(b) (emphasis added). The avoidance power provided in section 544(b) is distinct from others because a trustee or debtor in possession can use this power only if there is an unsecured creditor of the debtor that actually has the requisite non-bankruptcy cause of action. Yet, once avoidable pursuant to this provision, the transfer is avoided in its entirety for the benefit of all creditors, not just to the extent necessary to satisfy the individual creditor actually holding the avoidance claim.

226 F.3d at 243.

6. Regardless of how the holding in *In re Cybergenics* might apply to other cases, it has no application to the motion in issue. During these bankruptcy proceedings, the fraudulent transfer causes of action were considered by the parties in interest, including Mr. Haskell, to be assets of the bankruptcy estate to benefit all unsecured creditors, pursuant to § 544(b). This court and the Third Circuit, likewise, treated these causes of action as "derivative," i.e.,

as benefitting the bankruptcy estate as opposed to the debtors-in-possession or any single creditor.

7. Mr. Haskell has not demonstrated otherwise, despite the opportunity to do so. Based on this procedural context, Mr. Haskell is enjoined from pursuing, as personal to him, counts I, IV, V, and VI of the Haskell Restated Complaint, as such causes of action have been deemed extinguished by virtue of the holding in *In re: PWS Holding Corporation*, 228 F.3d 224 (3d Cir. 2000). Mr. Haskell is bound by that decision.

IT IS FURTHER ORDERED that, as a result of Mr. Haskell's violation of the confirmation order, he is directed to pay the costs (including reasonable attorneys' fees) associated with the instant proceeding. On or before **January 5, 2001**, the movant shall submit an affidavit of such costs. On or before **February 2, 2001**, Mr. Haskell shall either have paid such costs or have submitted an objection to the reasonableness of such costs.

/s/ Sue L. Robinson
United States
District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-1462

IN RE: PWS HOLDING CORPORATION;
BRUNO'S, INC.;
FOOD MAX OF MISSISSIPPI, INC.;
A.F. STORES, INC.;
BR AIR, INC.;
FOOD MAX OF GEORGIA, INC.;
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LAKESHORE FOODS, INC.;
BRUNO'S FOOD STORES, INC.;
GEORGIA SALES COMPANY;
SSS ENTERPRISE, INC.,

Debtors,

WYATT R. HASKELL, individually and on behalf of others similarly situated,

Appellant.

On Appeal from the United States District Court
for the District of Delaware

District Court Judge: The Honorable Sue L. Robinson
(D.C. No: 98-cv-00212)

Present: BECKER, *Chief Judge*, SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH and MICHAEL*, *Circuit Judges*

SUR PETITION FOR REHEARING EN BANC

The Petition for Rehearing filed by Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court, and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the Petition for Rehearing by the panel and the Court en banc, is hereby DENIED.

BY THE COURT
/s/ Julio M. Fuentes
United States Circuit Judge

DATED: November 1, 2002

/s/ KB/cc: JVH; JVP/ EGB; DJD; HRM; ARW

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* As to panel rehearing only.

IN THE UNITED STATES BANKRUPTCY COURT
IN AND FOR THE DISTRICT OF DELAWARE

In reply to	:	Chapter 11
PWS HOLDING CORPORATION INC., BRUNO'S, INC., et al.,	:	Case Nos. 98-212 – 98-223 (SLR)
Debtors.	:	(Jointly Administered)

Wilmington, Delaware
Monday, December 20, 1999
8:10 a.m.

BEFORE: HONORABLE SUE L. ROBINSON, U.S.D.C.J.

* * *

[507] claims and causes of action which are extinguished or released pursuant to the claim, including, without limitation, the claims extinguished pursuant to Section 9.3 of the plan and the causes of actions released pursuant to 12.5 and 12.6 of the plan." Is that correct, sir?

A. As I'm reading it, yes.

Q. Now, sir, I invite your attention to paragraph – page 22 of the Haskell complaint which is Haskell Exhibit No. 1.

A. Where?

Q. Page 22, at paragraph 93 (b).

It does allege, does it not, that the defendant directors causes Bruno's to incur unnecessary debt and to take unnecessary risks in order to benefit KKR or to permit

KKR to speculate for its own account by acquiring 83 percent of the stock of Bruno's with funds borrowed by Bruno's, including the proceeds realized by Bruno's in connection with Bruno's August 10, 1995 offering of the notes. It does say that, does it not?

A. Yes, it does.

Q. All right, sir. Now, are you aware of the fact that the Alabama Fraudulent Transfer Act, specifically Sections, Section 8-9A-7 and Section 8 –

MR. PATRICK: I'm sorry. Excuse me, your Honor.

THE COURT: That's all right. It's your time.

BY MR. PATRICK:

[508] Q. – permits a creditor to seek remedies, including the avoidance of a transfer to the extent necessary to satisfy the creditor's claim?

MR. MILLER: Objection, your Honor. Calls for instruction of the statute, legal conclusion. Mr. Demme is not a lawyer, and there is no foundation he ever read the statute.

Your Honor, I would also stipulate Mr. Patrick, if his clients have any direct claims, direct personal claims against anybody relating to this case, there is no provision in this plan which precludes them from prosecuting those claims in a court of competent jurisdiction. However, if the debtor believes those are derivative claims that are property of the debtors' estate, then those claims will be discharged if this plan is confirmed.

THE COURT: Well, as to the objection, Mr. Demme is not a lawyer, and I'm not confident that – well, I don't think he needs to answer that question. If you have any other questions to address, you may.

BY MR. PATRICK:

Q. I invite your attention to Section 8-9A-8 on page 268 of the Alabama Code, Exhibit No. 2.

THE COURT: Mr. Patrick, I think I sustained that objection.

MR. PATRICK: Ma'am, this is another section. [509] I'm simply asking whether this witness is aware of the provision that permits a creditor to obtain a judgment for the amount necessary to satisfy the creditor's claim, whichever is less, rather than to set aside a transfer. Is he aware of it, your Honor?

MR. MILLER: Same objection, your Honor.

THE COURT: Well, I'll sustain the objection.

MR. PATRICK: All right.

BY MR. PATRICK:

Q. On direct examination, you were asked, sir, about the examiner's report, which is I believe Exhibit 11 or 10 – 10 or 11 of the debtor's exhibits. I think that the examiner's report is Exhibit 10 and that the Exhibit 11 is the Weil Gotshal report on the leverage recapitalization claims. Do you recall that?

A. I'll take your word for it.

Q. You were asked and counsel said it was critical to this hearing that those two documents be introduced. Do you remember that?

A. Yes, I do.

Q. All right. Now, sir, I invite your attention to page 13 of the examiner's report which is Exhibit 10. Exhibit 10 at page 13.

A. Give me a second, Mr. Patrick.

Q. I think it's in the second volume of the debtors' [510] hearing exhibits.

A. What page?

Q. At page 13.

A. Yes.

Q. Now, in the last incomplete paragraph, does it not say, sir, while many of the individual creditors rights and claims will be informed by the examiner's analysis and conclusions, the rights and claims of individual creditors are beyond the scope of this report?

A. I haven't found that but I'll take your interpretation.

Q. All right, sir. I invite your attention to pages 230 to 239, sir – 238, I'm sorry, of that same examiner's report.

MR. MILLER: If your Honor please, the examiner's report is in evidence. Do we have to read?

THE COURT: Well, it's his time. He has a half hour and he has used almost 15 minutes, if he wants to use his time this way.

MR. PATRICK: Your Honor, may I seek guidance from the Court? I had understood that the Court wished us not only, even as to a stipulated document, that the Court wished us to call to the attention of the Court through a witness the portions that we thought particularly important. And I'm trying to do that, your Honor, even as to the Alabama [511] statute. I'm sorry.

THE COURT: All right. I guess I meant that I didn't want a document admitted without some explanation. I don't think I meant to say that you couldn't refer to it and admit a document in your argument, so if that is your only purpose, then we'll not make you spend anymore time on that.

MR. PATRICK: I certainly appreciate it, your Honor. I'm sorry. I was trying the best I could to comply with your Honor's instructions.

I would ask two further questions.

MR. PATRICK:

Q. Do you know why the examiner did not discuss the provision of the Alabama Fraudulent Transfer Act which permits an entity for whose benefit a transfer was made to be held liable for whatever damages the individual creditors sustained?

A. I do not know.

Q. Do you know why, sir, that Weil Gotshal report, which is Exhibit 11 introduced by the debtor, in your deposition, do you know why the Weil Gotshal report does not discuss the liability of KKR as the party for whose benefit the transfers were made under the Alabama

Fraudulent Transfer Act or under the Bankruptcy Act provision?

A. I do not know.

Q. Thank you, sir.

* * *

[515] court that are not a matter of public record.

MR. MILLER: They are. They are on file in this Court.

MR. WEISFELNER: The document that is on file doesn't have the interdelineation.

Your Honor, I'm going to withdraw the objection.

THE COURT: I was going about to say since it's recollection refreshed, it can go in, so therefore it's not worth our time.

MR. WEISFELNER: Right. Sorry about that.

BY MR. MILLER:

Q. Mr. Demme, compare 9.3 in the modified plan with the original plan.

A. Yes.

Q. Where were the changes that were made in 9.3?

A. The changes were where it said "all claims" was changed to "all avoidance claims" in the first paragraph A, and in B, it was changed "from all claims" that are asserted to "all other alter-ego or derivative claims."

Q. Do you remember whether those changes were made to eliminate the third-party claims?

A. Yes.

Q. Now, having seen that section, Mr. Demme, do you now recall that if any bondholder or noteholder has a direct claim against any party, including other noteholders, [516] including public stockholders, including the infamous KKR, including the banks and including Huff, those claims can be asserted without any injunction, without any discharge by this Court?

MR. WEISFELNER: Objection, leading.

A. Yes.

Q. Now, Mr. Demme, turning the plan of reorganization and those provisions relating to the continuation of employees in employment contracts, was the plan of reorganization proposed to entrench management?

A. To entrench management? No.

Q. Was your motivating factor the retention of your job?

A. Absolutely not. I had a contract.

Q. And does that contract currently provide for severance pay?

A. Yes, it does.

Q. Mr. Demme, you referred on your cross-examination to the state of your mind at the time of your deposition. Could you elaborate on that?

A. The evening before my deposition, I was informed by my Senior Human Resource Officer that we had a very, very serious issue that was arrived out of my Chief Financial Officer that in the scheme of things would probably

initiate his resignation, so that was a significant pressure to bear on me. I did not sleep all that evening and in honesty did

* * *

[597] Q. Did that first proposal result in a meeting with Huff?

A. It did.

Q. When was that meeting?

A. I think it was in June, last June.

Q. Who attended that meeting?

A. Myself, the representative of ConAgra, the representative from Frito-Lay, Huff and PriceWaterhouseCoopers representation.

Q. Who was at that meeting for Huff?

A. Bryan Bloom, I believe Ed Banks, and I believe Mr. Weisfelner.

Q. So –

A. There may have been someone else.

Q. So at this meeting, the subordinated noteholders, Huff representatives and counsel to the committee and PriceWaterhouseCoopers met together separately without the lenders –

A. That's correct.

Q. – to discuss a possible plan?

A. That's correct.

Q. Was there a list of topics that were discussed at that meeting?

A. In addition to the terms that were on the Huff sheet, we also indicated our expectation of a waiver of preferences

* * *

IN THE UNITED STATES BANKRUPTCY COURT
IN AND FOR THE DISTRICT OF DELAWARE

IN RE:	:	Chapter 11
PWS HOLDING CORPORATION INC., BRUNO'S, INC., FOOD MAX OF MISSISSIPPI, INC., A.F. STORES, INC., FOOD MAX OF GEORGIA, INC., FOOD MAX OF TENNESSEE, INC., FOODMAX, INC., LAKESHORE FOODS, INC., BRUNO'S FOOD STORES, INC., GEORGIA SALES COMPANY, SSS ENTERPRISES, INC., BR AIR, INC.,	:	Jointly Administered
	:	Case Nos. 98-212 (SLR) Through 98-223 (SLR)
Debtors.	:	

Wilmington, Delaware
Thursday, January 20, 2000
3:02 o'clock, p.m.

BEFORE: HONORABLE SUE L. ROBINSON, U.S.D.C.J.

* * *

[75] see whether it is a substantive change or whether it's just clarifying, and you might be able to do that without amending the order.

MR. PATRICK: Well, your Honor, we ask that the language be clarified. We submitted two proposed orders. One which we think would clarify the language in accordance with what we had understood the debtors' counsel to be representing to the Court and to us, and another which would simply eliminate altogether these releases. And I understand your Honor's – which we think might moot, in large part, might moot the appeals that had been argued.

THE COURT: Well, they certainly would, but I'm not prepared to do that.

MR. PATRICK: At any rate, the principal purpose of the motion was to seek clarification on this point.

THE COURT: All right. And I'm not – I don't know whether – if we're talking – I guess maybe I am confused by your definition of direct claims and derivative claims and whether there really is any confusion. Maybe I can hear from debtor's counsel, to see whether clarification is needed or not.

MR. MILLER: Your Honor, Harvey Miller again for the debtors.

[76] Whether Mr. Patrick says that substantive or procedural, he's arguing a substantive point. All fraudulent – state fraudulent transfer statutes speak in terms of a creditor having a cause of action if there existed a fraudulent transfer, and the right to recover his or her damage.

What happens, the intervention of bankruptcy, those claims pass to the trustee in bankruptcy or the debtor-in-possession. They then become property of the estate and

they can be dealt with in the bankruptcy. What Mr. Patrick keeps forgetting is there has been a bankruptcy here and these claims became property of the estate and, as property of the estate, they are dealt with.

What we stipulated to, if Mr. Patrick – Patrick's client, Mr. Haskell, can establish that he has a direct personal cause of action that is not property of this estate, he can prosecute that action. But he's going to have to have either determination by a Court of competent jurisdiction, that it's not a derivative claim, it's not a claim that was passed to the debtor and dealt with under the plan. We tried to reach agreement with Mr. Patrick prior to entry of the order. We wanted to put in the language if it was property of the estate, it does not go back to Mr. Haskell, but that was without prejudice to [77] him trying to establish that there was a direct claim, your Honor.

So we rest on our papers, your Honor.

THE COURT: All right. Mr. Patrick, I don't think there's anything else I can do for you. Your client has the right to try to establish the fact that these are direct claims, not property of the estate. I'm not going to change the confirmation order to basically give your client rights that I didn't intend to give him in the first place.

So to the extent you're asking for that relief, that relief is denied.

All right. I think we have one more matter. Mr. Patrick, you're welcome to hang on, but if you don't want to, you can sign off.

And that is the application by the fee examiner. And although, as you might be aware, I have issued an order to show cause why a fee examiner shouldn't be appointed in

this case for all professionals, I believe there is the preliminary issue of why the fee cap should be lifted in the first instance, and so I think we need to address that substantively. And then perhaps whatever is left here, we can find out later whether the fee examiner – whether the fee examiner – whether these fees would ever be subject to the fee examiner.

* * *

IN THE UNITED STATES BANKRUPTCY COURT
IN AND FOR THE DISTRICT OF DELAWARE

IN RE:	
PWS HOLDING CORPORATION, BRUNO'S, INC., FOOD MAX OF MISSISSIPPI INC., A.F. STORES, INC., FOOD MAX OF GEORGIA, INC.; FOOD MAX OF TENNESSEE, INC., FOODMAX, INC., LAKESHORE FOODS, INC., BRUNO'S FOOD STORES, INC., GEORGIA SALES COMPANY, SSS ENTERPRISES, INC., BR AIR, INC.,	Chapter 11 Jointly Administrated Case Nos. 98-212 (SLR) Through 98-223 (SLR)
Debtors.	

Wilmington, Delaware
Tuesday, May 9, 2000
At 4:00 p.m.

BEFORE: HONORABLE SUE L. ROBINSON, U.S.D.C.J

* * *

[3] PROCEEDINGS

(Proceedings began at 4:00 p.m.)

THE COURT: Good afternoon, counsel.

MR. MILLER: Good afternoon, your Honor.

THE COURT: I know there are, what, two matters on the agenda?

MR. MILLER: Yes, ma'am.

THE COURT: And one certainly is contentious, and the other I don't know whether it is as contentious, and the question is what we proceed first with. It looks like this has to do with the first matter, the motion for injunction?

[4] MR. MILLER: The motion to enforce the confirmation order, your Honor.

THE COURT: Well, I'm happy to go forward with that. I have set time limitations. And I do have some preliminary thoughts and questions that I hope counsel will address in their presentation.

It seems to me as though there cannot be any dispute that the confirmation order and the record related thereto specifically permits the Huff and Haskell parties to pursue personal direct claims against nondebtors. That provision in fact, at least in my recollection and in my opinion, was an emphasized selling point for the plan of reorganization.

It seemed to me that I contemplated having approved that, that at some point some court, and to quote the papers, "some court of competent jurisdiction" would have to determine whether Huff and Haskell's claims, whether the claims asserted were derivative or direct because you all can't agree on anything. I assumed there wasn't going to be a consensual resolution to that. And obviously because it wasn't going to be consensual, it was going to be costly, that kind of determination, which might well implicate these indemnification provisions that the debtors identified.

It seems to me as though the only dispute before me presently or at least the first dispute before me is who [5]

should make the determination as to whether these claims are derivative or direct, this court or the bankruptcy court in Alabama. And then the second question is when those determinations should be made, whether they should be made now or whether for some reason that determination should be further put off because of issues on appeal of whatever. And that I'm not prepared at this point to make a determination on the merits.

I know that the parties went forward on the merits but it seems to me the first question you all have to address, if you want to take your time to address the merits you can, is why either this court or the court in Alabama should be making a determination in the first instance. So I'm hopeful that you all plan to make that part of your presentation. If you weren't, you need to scramble and make sure you address that for my benefit.

MR. MILLER; May I proceed, your Honor?

THE COURT: Yes.

MR. MILLER: If your Honor please, Harvey Miller from the law firm of Weil, Gotshal & Manges, with Dan DeFranceachi from Richards Layton & finger, and Mr. Puntus from my office representing the reorganized debtors.

Your Honor has put the issue quite succinctly. The contemplation of a plan of reorganization in respect of direct or derivative claims was that there would be a [6] determination made initially first by the reorganized debtors as to whether these were direct or derivative claims. And with respect to the motion that was filed on April 3, your Honor, when that motion was filed, there were complaints in the Alabama state actions which had

been removed to the bankruptcy court. That motion was filed and directed to those two complaint that had been filed. On April 6th, your Honor set the schedule for this hearing. Subsequent to that time, both complaints were amended and restated. And if I may, your Honor, I would deal with the Huff complaint, restated complaint first.

The Huff restated complaint is, from our position, your Honor, is a new complaint. The reorganized debtors have renewed that complaint; and as stated in the reply that was filed on May 5th, your Honor, that complaint pleads direct causes of action. They plead causes of action relating to failure to disclose or misstatements, fraudulent deception with respect to documents that were filed under the various security laws. So with respect to the Huff complaint, your Honor, the motion is withdrawn. So that only leaves, your Honor, the motion with respect to the Haskell complaint or the Haskell – let me call it the Haskell restated complaint.

On April 24th, Haskell moved for leave to file an amended and restated complaint. It appears, your Honor, [7] at least from our perspective, that Haskell simply filed an amended and restated complaint and that complaint adopts many of the allegations and pleadings incorporated in the Huff complaint. And as to those counts, again, your Honor, the motion would be withdrawn. There are seven counts in the Haskell restated complaint; and counts two and three in that complaint, your Honor, Haskell restated complaint, from the perspective of the reorganized debtors and as stated in the reply, your Honor, they plead direct personal causes of action. And as to those two counts, your Honor, the motion is withdrawn.

There is a seventh count, your Honor, a catchall count which is a net to capture anything that could be captured which you really can't tell what the nature of the count is. So all the reorganized debtors are doing, your Honor, is reserving all their rights with respect to count seven and counts two and three as they progress but, in effect, your Honor, the motion is withdrawn as to counts two, three and seven of the complaint.

That leaves, your Honor, count number one, which is based upon the fraudulent transfer represented by the leverage recapitalization and refers to the Alabama Uniform Fraudulent Transfer Act. Count four, which is a count for breach of fiduciary duty relating to the leverage recapitalization, which your Honor I'm sure has heard more [8] than you ever want to hear. Count five is a conspiracy to cause a fraudulent transfer. And count six is for aiding and abetting a fraudulent transfer. And in the reply, your Honor, in paragraphs 23 and 24, we have replied to counts five and six. It is only as to those counts, your Honor, that the motion to enforce the confirmation order is directed.

And, yes, your Honor, the initial question is which court should construe the order that was entered by this court? It is, I'll call it, a hornbook proposition of law that the most appropriate court to interpret an order is the court which issued the order. And in connection with this particular matter, your Honor, section 9.3 of the plan of reorganization that was confirmed by this court specifically addresses the Haskell Alabama action in 9.3A and at 9.3B. And in paragraphs 50, 51 and 52 of the confirmation order, it is stated that the injunction applying to the claims that are asserted in the Haskell Alabama action and in the Huff Alabama action shall be extinguished

whether or not then pending. And the plan also provides, your Honor, for a retention of jurisdiction in article XI of the plan. And that retention of jurisdiction reserves to the court the right to construe and to hear all disputes concerning the plan of reorganization.

Now, the injunction which your Honor included [9] in paragraph 54 of the order of confirmation was intended to enjoin the prosecution of claims which were extinguished. Your Honor determined that the claims relating to the leverage recapitalization which belong to the debtor were extinguished and that anybody who attempted to prosecute those claims would be enjoined. and the purpose of that, your Honor, was to cut off the prosecution of those claims and the expenses and liabilities and other distractions which would result from the prosecution of those claims. Those were the purposes of those provisions in the plan of reorganization.

Haskell, your Honor – and I have to get to the merits, your Honor – has taken the position right from the inception of his appearance in this case, and to put it in context, your Honor, as set forth in Mr. Snow's affidavit which was filed as part of the answer, Mr. Snow purchased all of his notes after the Chapter 11 case was filed. Mr. Haskell, if I recall the things correctly, something in excess of 80 percent of the notes that he purchased were after the Chapter 11 case. Mr. Haskell's position has always been, your Honor, that the Alabama Uniform Fraudulent Transfer Act gives a creditor a direct claim for injuries suffered as a result of a fraudulent transfer. Every uniform fraudulent transfer act, every uniform fraudulent conveyance act speaks in terms of a creditor's right to sue for injuries [10] inflicted upon that creditor as a result of a fraudulent transfer, if proven.

The issue, as we have discussed many times in this court, is once a bankruptcy intervenes, all rights under the fraudulent transfer laws, whether the fraudulent conveyance law or the fraudulent transfer law, pass to the trustee or the debtor in possession. And in this case, it has passed to the debtor in possession. And the issue in these cases was should the debtor in possession prosecute those claims. And your Honor appointed an examiner and the examiner made a very extensive and comprehensive investigation and concluded the claims weren't violated.

The claims were dealt with, your Honor, as parts of the reorganization process. They were not abandoned. That was not the tact that was taken. The tact that was taken was that these claims are not viable claims and they should be extinguished. That was the issue, one of the issues, one of the main issues of the three-day confirmation hearing which your Honor heard. And your Honor determined that the plan was appropriate and the claims were extinguished.

Haskell made a motion to alter and amend the order of confirmation so it would give him authority to continue to prosecute his version of the fraudulent transfer case, and the case is made by Haskell that he has a direct [11] right under the Alabama statute. And as we pointed out, your Honor, when your Honor heard the motion to alter and amend, that was pre Chapter 11. The right to prosecute that claim passed to the trustee in bankruptcy qua debtor in possession. The debtor in possession determined with the support of the economic parties in the case, that the claims were unviable and they were extinguished. That's the law of this case, your Honor, that these claims are extinguished. And unless the Court of Appeals does

something differently, that's the law of the case as it sits today.

Notwithstanding that, your Honor, and notwithstanding the denial of the motion to alter and amend which was not appealed to the Third Circuit, Haskell is proceeding with the same counts that were in the complaint, the ones I mentioned, counts one, four, five and six, all of which are either based upon the Alabama Uniform Fraudulent Transfer Act, that's count one, or a breach of fiduciary duty count four, relating to the leverage recapitalization and the breach of fiduciary duty, if it occurred, resulted in harm to the corporation. And if it was harm to the corporation, it's the corporation's cause of action or claim. And as the corporation's property, it was dealt with in the plan.

Now, count five is the conspiracy to cause a fraudulent transfer, and that's the same thing. Your Honor [12] ruled that claims relating to the leverage recapitalization are extinguished. That's the order which is extent today and has been extant since December 30.

Count six is a count or a claim for aiding and abetting a fraudulent transfer, so all of those four counts, your Honor, are all tied to the leverage recapitalization and predicated on the basis that the leverage recapitalization was a fraudulent transfer under Alabama law.

As we have pointed out, your Honor, those causes of action, those claims belong to the corporation. It was the debtor in possession acting qua trustee who had the right to prosecute those claims. The debtor in possession negotiated with the creditors committee and the banks and provided for the extinguishment of those claims. Your Honor approved that. It became part of the order of

confirmation. It is extant. It's binding on Haskell, Your Honor.

Haskell claims, your Honor, because the claims were unprosecuted they revert back to the preChapter 11 holders. That isn't the law, your Honor, unless the claims are abandoned. The claims in these cases were never abandoned. They were the subject of a specific provision in the plan. They were the subject of a specific provision in the order of confirmation.

The case, the Klingman (phonetic) case which is relied upon by Haskell, your Honor, is a case in which [13] the trustee in bankruptcy did nothing with the so-called fraudulent transfer claims. All of the statutes of limitation applicable to the trustee had expired. The trustee no longer had the right to prosecute them. The claims were deemed abandoned. There is no affirmative action taken with respect to those claims. They reverted back to the prechapter, prebankruptcy holders.

That is not the case with respect to Bruno's, your Honor. The claims were affirmatively reviewed, investigated. Conclusions were reached and a plan provision took care of those claims in the same manner as if they had been compromised and settled, your Honor. They were extinguished. And the order confirmation is extant today in that form and is binding on Haskell, your Honor.

Mr. Haskell also makes reference, your Honor, to the concept that because he claims are unprosecuted, therefore they weren't treated in the Chapter 11. And he refers to some language in the Colonial Realty case, which is a Second Circuit case which, your Honor, is an automatic stay case. And that particular case, excuse me, creditors tried to bring a fraudulent transfer case while the Chapter

11 was pending. And the trustee or debtor in possession moved to enjoin the prosecution, say this was a violation of the automatic stay. And the Second Circuit said yes, it is a violation of the Second Circuit because it violates Section [14] 362(a)(1). It's an action by creditors to recover on a claim against the debtor.

Mr. Haskell says, well, that just demonstrates it's not property of the estate. That is inaccurate, your Honor. As the Mortgage America case says, when a bankruptcy or a Chapter 11 intervenes, these claims, these causes of action pass to the trustee, pass to the debtor in possession for administration and disposition or abandonment. They were never abandoned in this case, your Honor.

So we get back to the question, your Honor, why should your Honor make a determination? We would submit your Honor is appropriate to make the determination because you sat through this ordeal. You sat through this odyssey that started in February of 1998 and through the examiner's investigation and you probably have more knowledge of the allegations about leverage recapitalization than any other judicial officer in the United States. You know what the claims are. You know what was decided on December 30, 1999. You know what was done in this court in relation to the leverage recapitalization claims. Moreover, your Honor, it is your order. It is your order that was made on the basis of a very hotly contested three-day confirmation hearing, most of which circled around the leverage recapitalization and the assertion that it was a fraudulent transfer.

Mr. Haskell has tried three times now, to my [15] count, to end run what was going on in this court. Pending the confirmation order, the prosecution of these actions

were stayed. These actions were started in Alabama primarily, as I understand this, your Honor, the day before the Alabama legislation became effective limiting punitive damages. That was the first reason for filing them. The second reason was to preserve another statute of limitations.

Now, we have had so far, I think, your Honor, five different complaints filed. And as I said, between April 6th and April 24th, two additional complaints were filed. And I received a copy of a letter the other day from the Klehr Harrison firm that another complaint was filed in the state court by Huff which I believe parallels the one that is before Judge Mitchell in the Alabama bankruptcy court.

It is appropriate, your Honor, for this court to make a determination as to whether the four counts in the Haskell restated complaint violate the confirmation order, violate the injunction in the confirmation order. Judge Mitchell is not going to make that determination at this time, as I understand it, your Honor. All that is pending before Judge Mitchell at this time, and as I understand has also been deferred for 45 days going back to sometime in April. is the consideration of the plaintiff's motion to remand back to the state court and the motion of certain [16] defendants to transfer the cases to this court.

If the cases are remanded back to the state court, your Honor, then there will be a state court judge in Alabama making a determination as to the effect, scope, and efficacy of an order which was entered by this court – an order which that court will have absolutely no knowledge whatsoever of the circumstances as to how that order was entered. All of the knowledge which your Honor has concerning this case would be dissipated. And that was

one of the reasons, your Honor, for the retention of jurisdiction in the order of confirmation.

Now, a retention of jurisdiction is pretty standard operating practice for an order of confirmation, but particularly in this case, your Honor, where there was an extinguishment of claims where there is an injunctive provision. And again, injunctive provisions in confirmation orders are not atypical. They are put into confirmation orders to prevent the kinds of things that are happening with respect to this case, to avoid great expense on the part of reorganized debtors.

We have been very candid, your Honor. When we received the Huff restated complaint, we reviewed it with the appropriate persons. it pleads a direct cause of action. There is no reason for Bruno's supermarkets to be involved in it. We didn't file a motion your Honor, the reorganized [17] debtors, after the confirmation order with respect to the actions in Alabama because we were under the impression they were going to be resolved in some way. They weren't resolved.

We didn't file a motion, your Honor, until we got all these indemnity claims. And the four counts in the Haskell restated complaint are so obviously, so clearly violative of the injunction provisions because you can't read those counts, your Honor, without coming to the conclusion that these are derivative claims, that they are based upon the leverage recapitalization and they should not be allowed to go forward.

As to the other two counts or three counts in the Haskell restated complaint, again, your Honor, we withdraw the motion. So we submit to your Honor that you are the most appropriate person based upon your experience

with these cases. And I understand how you might feel about that, to make the determination as to whether the motion should be granted. And, two, that these counts, these claims in counts one, four, five and six, are so patently derivative claims based upon a fraudulent transfer and the leverage recapitalization that the claims that were extinguished under the plan that Mr. Haskell should be directed to cease and desist from prosecuting those claims.

Unless your Honor has some further questions?

[18] THE COURT: I do have one question. I'm not particularly versed in what is going on on the appeal and whether the appeal would have any effect on the claims that are still at issue; in other words, whether thee is any reason to defer this determination until the appeal has been decided.

MR. MILLER: I'll try to answer that question as best I can, your Honor. Not being up on the bench, it's hard to do that. The appeal was argued on March 10th. I don't know what the general period for rendering a decision is in the Ninth Circuit. I'm told it usually runs around 90 days.

There certainly is a prayer for relief in the Third Circuit that the extinguishment provision is inappropriate, erroneous, illegal and whatever and that the Court of Appeals at the least should model some relief with respect to those provisions of the plan and the confirmation order, among other prayers for relief. But as it directly relates to this, I think it's fair to say that the appellants would like to see that provision excised from the order of confirmation.

THE COURT: All right. Thank you very much, Mr. Miller.

MR. PATRICK: Your Honor, do I understand that your Honor has given Mr. Haskell, my client, and Huff a total of 30 minutes?

[19] THE COURT: I did. I guess – Is counsel for Huff still planning to make any argument under the circumstances?

MR. BEUS: Not any meaningful argument, your Honor. We'll be less than three minutes.

THE COURT: I guess I'm not sure I understand that. Well, Mr. Patrick, why don't you go ahead and start and we'll see how far you get.

MR. PATRICK: I'll try, your Honor.

Your Honor will recall that at the confirmation hearing, Mr. Miller made the representation to the Court at page 987 on December 22, "because of modifications in the plan" – and he is talking about the December 10 modifications – "if there was a direct injury by reason of any action on the part of any officer or director to any party which caused nonderivative harm to Huff, to any stockholder, any noteholder, this plan does not enjoin or stop the prosecution of those claims. And if Huff wants to continue that Alabama action and try to prove those direct personal claims, it has that option.

"Your Honor: As does Mr. Haskell, because there is no release under this plan for direct third party claims. And there is no giving of a release to any party like KKR."

Now, your Honor, we did see that, we did believe that there could be, that one of the defendants might make [20] the argument that our claims were barred as nondirect because of some provisions of the order. We filed a motion seeking clarification. And, your Honor, on January 20, 2000 at page 77 of the transcript said: "All right. Mr. Patrick, I don't think there is anything else I can do for you. Your client has the right to try to establish the fact that these are direct claims, not property of the estate."

Now we took the representations, and it was done on many occasions by Mr. Miller, as debtors' counsel, and we took your Honor's comments, your ruling from the bench to be an order that we had the right to proceed in the Alabama case, as Mr. Huff – as Mr. Miller had argued on December 22.

THE COURT: Within certain guidelines. In other words, you didn't have the right to pursue derivative claims, you had the right to pursue direct claims.

MR. PATRICK: To pursue direct claims. And your Honor, as to the first question, you said who makes the decision? Do I have to sit here as chief judge of this district and with all the things I have on me and try to make that decision? And that's a question of Alabama law, your Honor, as to whether there are direct claims. In a bankruptcy proceeding, state law determines whether a right to sue belongs to the debtor or the individual creditors. That's an In Re: Mediators, 105 Fed 2d 822, at 825 (2nd [21] Circuit 1997).

In Alabama, your Honor, Section 8-9-A-8 of the Code of Alabama says that "the creditor may recover judgment for the value of the asset transferred or the amount necessary to satisfy the creditor's claims, whichever is

less." So under Alabama law, a creditor has a direct right to obtain a judgment for the amount of the creditor's claim, not for some corporate claim, not for other people, just for the creditor. Under Alabama law, a grantor, like Bruno's, is not even a necessary party to an action brought under the act. And we've cited that, Simmons vs. Clark Equipment Co. in our papers.

Now, your Honor, the argument that the debtors seem to be making is that they concede that prior to the filing of the Chapter 11 proceeding by Bruno's, that under Alabama law, I'm correct, that Haskell has a direct claim but they argue that because of the bankruptcy code, once there is a filing of a claim, that somehow or other that extinguishes itself or that deprives the creditor of the claim and that the exclusive right to assert that claim is in the trustee. Your Honor, the bankruptcy code does not say that. Nothing in the bankruptcy code says that.

In the Klingman case, Klingman vs. Levinson, which is cited in our brief, the U.S. District Court for the Northern District of Alabama said that "the commencement of [22] bankruptcy gives the trustee the right to pursue fraudulently conveyed assets to the exclusion of all creditors."

Now, your Honor, the point there is that the trustee, a trustee in bankruptcy may, under the bankruptcy act, avoid a fraudulent transfer – may, doesn't have to but may. There is nothing in the bankruptcy act that says that that deprives the creditor of their claim. It simply confers upon a trustee in bankruptcy a right to avoid the claim if the trustee chooses to do so.

The Court went ahead and said the trustee's exclusive right – said in this Klingman case, "trustee doesn't retain this exclusive right in perpetuity." This is a page 17 of our

brief, your Honor. I quoted that. It says "the trustee's right to maintain a fraudulent conveyance act cause of action expires and creditors may step in or resume actions when the trustee no longer has a viable cause of action." And they cite a bunch of cases.

Once a bankruptcy case has been closed, the creditors having unavoided liens on fraudulently conveyed property can pursue their state law properties independently of the trustee in bankruptcy.

Now, there is nothing in the bankruptcy code that creates a springing right of action or a springing cause of action that somehow or other it disappeared and now it's going to spring back. The point is the Klingman case said [23] these rights continue to exist. It's simply that the bankruptcy court can give the trustee the right, in order to marshal the assets and collect the assets and distribute them equitably, it can get preference in pursuing those claims and he can avoid the claim. But, your Honor, once the trustee statutory time period has expired, an unsecured creditor may bring an action against a fraudulent transferee under state law, provided the state statute of limitations has not yet expired.

And that case, your Honor, I think governs this situation. That's what has happened here. And as we understand the Court's order and Mr. Miller's representations, and as to what the plan is, we understood the plan and the court order, it did not, it only purported to extinguish the claims of the corporation, the debtors who had sought bankruptcy.

Now, frankly, we and Huff disagreed with the debtors claims being extinguished, but that is an issue on appeal. We did not understand that the direct claims of creditors

were destroyed or extinguished by virtue of that provision of the order.

THE COURT: Well, I don't think anyone does. I think the question is whether the remaining claims that Haskell, the remaining claims that are in dispute truly are direct claims or whether they are derivative.

MR. PATRICK: Well, your Honor, as to which court [24] should decide, isn't that a question which could be left to an Alabama court to look at the Alabama law? And your Honor, the debtor cites a good number of cases that talk about the ordinary kind of derivative case and say, well, there is injury to a corporation that a shareholder can only bring a derivative claim. But the Alabama statute, and we quoted it in the footnote on page 2, it confers a direct right of action on a creditor to get a direct judgment.

And we think that the court has said – you know, when I came here, your Honor, I asked this court to rule. I didn't ask some – I didn't try to do an end run around this court. I came to the court with our motion, and I asked this court to rule, and Mr. Miller argued that that would be a question to be decided by a court of competent jurisdiction, but if you had a direct claim it could be pursued.

And your Honor said, in effect, as we understand it, go and pursue it. If you can prove you have a direct claim, so be it. And that's what we understood your Honor to say. We think that is the law of the case. And we think you ought not to let the debtors change their mind and come back in and say, well, only you can decide this or you have to decide this.

Your Honor, we have cited several cases in our – and we think that would be consistent with the Continental Airlines II decision and with a decision of this court, the [25] District Court for Delaware in the Reliance case.

And it's consistent with the California Bankruptcy Court decision that is cited at page 28 of our response. It's page 28, your Honor. That's a case where the court said that California law, "California courts permit a creditor to recover civil damages from those who conspired to transfer the property of a debtor to hinder, delay or defraud creditors." And then it says, a "a trustee – bankruptcy trustee, however, is not authorized to pursue every action that creditors might pursue." That's on page 28, your Honor, of our response.

And it says that, in short it says, on that same page, the direct quote, "the trustee's only authority to bring state law claims of creditors in Section 544(b), and Section 544(b) does not authorize trustee to assert a claim for aiding and abetting a fraudulent transfer."

Now, the statute permits you to sue a transferee or a person for whose benefit the transaction was made, but it doesn't talk about aiding and abetting or conspiracy. And I'm sure the defendants will be arguing there is no such claim in Alabama or anywhere else but this Alabama court said there is a cause of action for conspiracy or aiding and abetting someone else in committing a fraud or fraudulent transfer and that can be brought by a creditor but it's a direct claim. And they said that a trustee couldn't even [26] bring that claim.

Your Honor, we argue they've misconstrued our complaint. We've complained not only about the transactions that occurred in '95, we've complained about

subsequent transfers. They say that our claim against the directors is only based on the fraudulent, on the leverage recapitalization. That is not so. We've also said they're responsible for these misrepresentations that were made which they concede are claims that a trustee couldn't even bring and they concede are direct claims.

I don't want to exceed my time. And I'm not sure how much time your Honor has given me – I mean that I have left.

THE COURT: You have at least a good seven minutes, at least.

MR. PATRICK: All right.

THE COURT: And I guess one question you might answer. It seems to me as though although there are questions of state law involved, I think it is virtually impossible to separate the state law questions from the fact that there was a bankruptcy and from considering the overlapping bankruptcy issues. Therefore, I am not concerned particularly about letting the bankruptcy judge in Alabama decide these questions. I am concerned about the prospect of a state court judge in Alabama who as far as I know wouldn't [27] have any experience in how the bankruptcy process works in deciding these questions. And as I understand it, both you and Huff, although Huff is not so much a question now, but that you have joined in or have a separate motion for remand to the state court from the bankruptcy court?

MR. PATRICK: Yes, ma'am. We had filed a motion to remand and the defendants have filed a motion of transferring the case up here. Those matters have been set by motion – I mean by, there has been a scheduling

order, including the scheduling of an evidentiary hearing and a time for agreeing on documents and exhibits and a time for submitting lists of those to the court down there. So those issues are all there. She has not decided the issue.

And in all deference, it does seem to me there are judges sitting on our state bench who have practiced in bankruptcy proceedings, and the bankruptcy judge down there who has the matter presently, Judge Mitchell, is a very experienced bankruptcy judge. And it seems to me that the argument that somehow or other the judge down there is going to misconstrue the bankruptcy law, I don't think that that is a necessary conclusion at all. And the question really, as I understood the court's order and debtors' representation, the question is whether or not this is a direct claim. And that's a question of state law.

Now, in Continental Airlines and in Reliance, the [28] court in both those cases, the District Court of Delaware here in the Reliance case, the Reliance Acceptance case, and the Third Circuit in the Continental airlines case said "granting permanent injunctions to protect nondebtor parties, people who haven't sought the protection of the bankruptcy court, on the basis of some theoretical identity of interest alone would turn bankruptcy principles on its head. We find that the bankruptcy court and the district court lacked sufficient evidentiary and legal basis to authorize the release and permanent injunction of plaintiff's claims under any of the standards adopted by courts that have evaluated nondebtor releases and permanent injunctions." [205 F.3d 203 at 217 (3d Cir. 2000)].

And, your Honor, we have not construed this court's order as attempting to bar our direct claims against third

parties, against nondebtors. And we respectfully submit we should be permitted to proceed, and the issue can be raised in due course in whatever court, as is the case whether Judge Mitchell retains jurisdiction or whether she sends it back to the state court. It can be decided in due course. And it seems to me that there is no absolutely no necessity for this court to do it.

Now, frankly, we had asked the Court to rule in our motion to alter/amend, we asked the Court to rule on this question, and the Court said I'm not going to do it but you have a right to try to establish it. And we understood that [29] meant you can go back and in the ordinary course of the case, if the defendants want to raise that issue, they can raise it, and then we can, it can be decided by the court. That Alabama court is a court of competent jurisdiction, your Honor.

Now, I want to save a little time for counsel for Huff, and if the Court has some other questions as to when it ought to be decided.

Your Honor, the court down in Birmingham has twice postponed, at least twice postponed hearings on the pending motions, and she said she wanted to know how long the Third Circuit usually took on appeals. There was a report made to her. And she said well, I think I'm going to go ahead and schedule something. There is no reason why we can't go ahead and decide these issues that are before them and there was a scheduling order entered and the court accommodated, Judge Mitchell accommodated the vacation plans and the scheduling plans of the defense lawyers. There were several lawyers involved. And, of course, your Honor, the court in the Reliance case and in the Continental case, Continental Airlines II case both

said potential claims for indemnity are not a proper basis for injunction.

Now, we don't think we've been enjoined up to this point, and we certainly hope the Court would not enjoin us from trying to establish we have direct claims, as the [30] Court indicated on January 20.

Thank you, your Honor.

THE COURT: All right. Thank you very much.

MR. MILLER: Your Honor, may I respond to Mr. Patrick?

THE COURT: Briefly, unless you want to save it all for rebuttal, Huff and Haskell.

MR. MILLER: I have nothing to say about Huff, your Honor.

THE COURT: All right.

MR. MILLER: If your Honor please, once again you put your finger right on it, your Honor. This is not simply a question of state law, this involves interpretation of the bankruptcy law, and it is a matter which certainly should be in the bankruptcy court and it's not going to be in the bankruptcy court. At least, the plaintiffs don't want it to be in the bankruptcy court in Alabama.

Calling a claim direct is not conclusive. As I pointed out to your Honor, every uniform fraudulent transfer act, every uniform fraudulent conveyance act talks in terms of direct claims. What Mr. Patrick refuses to recognize is that the intervention of bankruptcy creates a new owner of that claim and the new owner became the debtor in

possession. And the debtor in possession dealt with these claims.

[31] The Reliance case and the Continental II case are inapposite. They deal with third party releases. We're not talking about third party releases. We're talking about the extinguishment of claims that were property or belonged to these debtors' estates. And the issue before your Honor in the confirmation hearing was whether those claims should be extinguished. That was litigated before this court. And your Honor approved the extinguishment and a consequence of that extinguishment were the releases that were granted under the plan. And those issues are up on appeal, your Honor. I grant you that, but there are releases in those plans.

If Mr. Patrick's argument was correct, your Honor, and a trustee or a debtor in possession had a fraudulent transfer claim and settled it in the Chapter 11 case with all of the potential defendants for a dollar, or for a thousand dollars, whatever it might be, and your Honor approved the settlement, his interpretation of a uniform fraudulent transfer act not withstanding, that settlement, notwithstanding those releases, you can still sue because the statute says it's a direct claim. That's not the law, your Honor. It became the property of these estates and it was dealt with under the plan.

It's on the basis of the Reliance case, your Honor, that we recognize that the Huff restated complaint as pleaded appears to plead direct causes of action.

[32] The counts in the Patrick restated complaint, counts one, four, five and six, your Honor, do not plead direct claims. Even Huff, in its answering papers, your Honor, and as my friends, Mr. Puntus says, no shy litigant

conceded that, and they drafted a fiduciary duty out of the restated complaint. It simply is a complaint, your Honor, as to those counts which is based upon claims which were extinguished.

And I submit again to your Honor, this is the court or bankruptcy court but we're not sure of the bankruptcy court, but given everything your Honor knows about these and it's mentioned in the order of confirmation, it's mentioned in the plan, these actions are specifically identifiable. And, your Honor, Mr. Patrick did not ask your Honor to rule that these were direct or derivative. He asked your Honor to amend the order of confirmation to say that they could proceed with the action. And he refused to accept language that we proposed to him that said they could proceed as long as it wasn't property of the estate. He knows that this is property of the estate. He knows he is proceeding with extinguished claims but he focuses on one word direct from the statute, your Honor, which is no longer relevant once there is no longer a bankruptcy.

Thank you, your Honor.

THE COURT: All right. Thank you. Let's hear [33] from counsel from Huff.

MR. KORTANEK: Your Honor, Steve Kortanek. I rise to introduce to your Honor and move the admission of Leo R. Beus from the law firm of Beus Gilbert in Arizona. Mr. Beus is admitted in the bar of Arizona.

THE COURT: All right. Thank you very much.

MR. BEUS: Thank you, your Honor. I have had a long presentation prepared and I'm not going to do that. May I pass up an order for execution consistent with Mr. Miller's statement?

MR. MILLER: Your Honor, this calls for a denial. The motion is withdrawn, there is nothing to deny.

THE COURT: All right. Let's hear your presentation before I sign anything.

MR. BEUS: Well, with respect to whether our claims are direct claims, there is now a position that is uncontroverted by Mr. Miller that they are in fact direct claims, that they fit within paragraph 52 of the plan of reorganization and we are entitled to bring them. A motion to enjoin should therefore be denied.

Are they direct claims? Let me take one or two moments and just go through a brief, brief factual explanation of what these claims are all about.

THE COURT: And I will clarify for the record that I believe the statement was they appear to state direct [34] claims on the face of the complaint.

MR. MILLER: That being so, your Honor, is it necessary to further complicate the record?

THE COURT: I don't know. We'll see.

MR. BEUS: Let me explain why they are in fact direct claims. We maintain, and to put it very simply, what happened here is KKR, Deloitte and others had absolute knowledge that the representations that they made to our clients, eyeball-to-eyeball and face-to-face were in fact fraudulent.

We have now discovered that Deloitte had done due diligent prior to the recapitalization in August of 1995 and had learned and submitted a written report to KKR that – and these are quotes right from what they call Project

Crimson – that their real estate was overstated and identified it by at least that amount, $8 and-a-half million. That there were closed stores, three million square foot of them, 14 vacant stores. That the insurance reserve was understated in the financial statements. That the inventory was overstated. That the depreciation was understated. That the technology that they held as an asset on their books was overstated. And that –

MR. MILLER: If your Honor please, if I might, your Honor, Mr. – I'm sorry, I didn't get your name.

MR. BEUS: Beus.

[35] MR. MILLER: Mr. Beus, I'm sorry, is making a statement here. There is nobody here, your Honor, who can respond to whatever Mr. Beus says. This is directed to KKR and others, and I think it's highly appropriate to have these statements on the record with nobody here to respond to them. And in the context of the withdrawal of the motion, I'm at a loss to understand what the relevance is.

THE COURT: Well, I am concerned that we're having basically assertions of fact given when there is no real dispute left. So perhaps you can summarize.

MR. BEUS: I can, your Honor. We have the order executed. If that is their position, that's not been their position in the briefing. They took us on in the brief. We sent copies of the brief to all of these people.

MR. MILLER: That's not accurate, your Honor. They filed a new complaint and a new reply. We said we have no problem with it. There is no controversy before the Court.

MR. BEUS: The new complaint has many of the same aspects as the old complaint which they challenged.

MR. MILLER: Well, we're not challenging it now, so I don't understand.

MR. BEUS: We'll just have the order signed then.

THE COURT: Well, counsel, first of all, the motion has been withdrawn as to your client. So I don't [36] think that there is anything for me to deny at this point, so I'm not going to sign the order.

Now, if there is something else you need to put on the record, I'm happy to have it on the record, aside from the fact that the debtor shave withdrawn their motion for an injunction as to W.R. Huff Asset Management Company.

MR. BEUS: If it is in fact withdrawn, may we have an order to that effect other than the verbal representation? That's not consistent with their prior pleadings, but –

THE COURT: Well, I'm happy to, if you are not satisfied with the record made here, I'm happy to –

MR. MILLER: I'll be happy to submit an order your Honor, saying it's withdrawn.

THE COURT: I'll write one up right now.

MR. BEUS: Good.

THE COURT: And have it typed.

MR. BEUS: Thank you, your Honor.

THE COURT: Anything further with respect to this particular motion

MR. MILLER: (Shaking head no.)

THE COURT: I'm not going to issue an order from the bench. I want to go back and make sure that I am as familiar as you all were with exactly what was said and what was represented in January with respect to Haskell, and so I [37] will, I will try to issue something within the week with respect to Haskell counts one, four, five, six. It is my understanding, Mr. Patrick, that the motion is withdrawn with respect to counts two, three and seven. All right?

All right. Why don't you move on to the second matter on the agenda.

MR. MILLER: If your Honor please, might Mr. Puntus and I be excused, in that there is only one person I hold in more terror than the Court? That's my wife.

THE COURT: All right. That's fine.

MR. MILLER: Thank you, your Honor.

THE COURT: Thank you very much.

MR. WEISFELNER: Your Honor, may we all be excused?

THE COURT: You all may be excused.

THE ATTORNEYS: Thank you, your Honor.

(Proceedings pause while every attorney leaves except Mr. DeFranceschi and Mr. Battista.)

MR. BATTISTA: Good afternoon, your Honor. My name is Elio Battista. I'm with The Bayard Firm on behalf of Edith Jo Ann Bargeron. This is the time the Court has set for Ms. Bargeron to seek to extend the bar date. Seeing it's late in the day, I have a suggestion for the Court. I have here Mr. Will Burch, Ms. Bargeron's attorney from Georgia, and he is here to testify. I would suggest I'm

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IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

WYATT R. HASKELL and JAMES S. SNOW, JR., suing on behalf of themselves individually and on behalf of a class described herein consisting of all similarly situated natural persons or entities who presently own 10-½% senior Subordinated Notes Due August 1, 2005 issued on August 10, 1995, by Bruno's, Inc. or who purchased such Notes on or after August 10, 1995 and thereafter sold the Notes at a loss,	**AP 99-288-TOM**
Plaintiffs,	
vs.	
KOHLBERG, KRAVIS, ROBERTS & CO., L.P., a Delaware limited partnership; KKR ASSOCIATES, L.P., a limited partnership; KKR PARTNERS II, L.P., a limited partnership; HENRY R. KRAVIS; GEORGE R. ROBERTS; PAUL E. RAETHER; JAMES H. GREENE, JR.; NILS P. BROUS; EDWARD A. GILHULY; PERRY GOLKIN; SAUL A. FOX; ROBERT I. MACDONNELL; MICHAEL W. MICHELSON; CLIFTON S. ROBBINS; SCOTT	

M. STUART; MICHAEL T. TOKARZ; WILLIAM J. BOLTON; RONALD G. BRUNO; ROBERT G. TOBIN; CHASE MANHATTAN BANK, as successor-in-interest to Chemical Bank, Lead Bank, and Agent for holders of "Senior Indebtedness" of Bruno's; MURRAY DEVINE & CO., a Pennsylvania corporation; SALOMON-SMITH BARNEY, INC., a member of Citigroup, as successor-in-interest to Salomon Brothers, Inc. and Robinson-Humphrey, a Delaware limited liability company; and defendants A through Z, AA through ZZ and AAA through ZZZ, described herein, whose names are presently unknown but will be supplied by amendment,

Defendants

AMENDED AND RESTATED CLASS ACTION COMPLAINT

(Filed April 26, 2000)

Pursuant to Rule 15(a), Fed.R.Civ.P., no responsive pleading to plaintiffs' original Class Action Complaint having been served, plaintiffs, suing on behalf of themselves individually and on behalf of the members of the plaintiff class defined herein, hereby allege as follows as their Amended and Restated Class Action Complaint seeking compensatory damages, punitive damages, and

such other, further and different relief as the Court may deem appropriate, against each of the Defendants.

I. PLAINTIFFS

1. Plaintiffs WYATT R. HASKELL (hereinafter "HASKELL") and JAMES S. SNOW, JR. (hereinafter "SNOW") are beneficial owners of 10½% Senior Subordinated Notes due August 1, 2005 (herein "Notes" or "Bruno's Notes") issued on August 10, 1995 by BRUNO's, INC., an Alabama Corporation with its headquarters and principal place of business in Birmingham, Alabama. HASKELL, SNOW, and members of plaintiff class purchased Bruno's Notes in reliance on publicly available written documents (such as Bruno's Form 10K's, Form 10Q's, Form 8K's, news releases, letters to shareholders, and Prospectus and Supplemental Prospectus dated August 10, 1995) which were materially misleading, omitted material facts, and suppressed and concealed material facts (including the wrongful acts and wrongful omissions described hereinbelow).

2. Pursuant to Rule 23 of the Alabama Rules of Civil Procedure, plaintiffs HASKELL and SNOW bring this action on behalf of themselves individually and on behalf of a class (herein the "class" or "plaintiff class") consisting of all similarly situated natural persons or entities who presently own 10-½% Senior Subordinated Notes Due August 1, 2005 issued on August 10, 1995 by Bruno's, Inc. (the "Notes") or who purchased such Notes on or after August 10, 1995 and thereafter sold the Notes at a loss. The term "plaintiffs" in this Amended Complaint shall include members of the class represented by plaintiffs unless the context indicates otherwise.

3. On information and belief, there are more than 1700 natural persons or entities who presently own Bruno's Notes or who purchased such Notes on or after August 10, 1995 and thereafter sold such Notes at a loss. The proposed plaintiff class is so numerous and geographically widespread that joinder of all members is impractical.

4. The claims of the plaintiffs and members of the plaintiff class involve common questions of law or fact, including (a) whether the defendants are liable to plaintiffs and members of the class because defendants conspired to cause Bruno's to engage in transfers of Bruno's money and other assets to one or more of the defendants or to third parties for an inadequate consideration (herein "the transfers") which transfers operated as a fraud on Bruno's existing and future creditors, including plaintiffs and members of the plaintiff class; (b) whether each of the individual defendants who is a general partner of Kohlberg, Kravis, Roberts & Co., L.P. (which, together with its affiliates, is collectively referred to hearing as "KKR") is chargeable with the knowledge, and liable for the acts and omissions of defendant KKR, each of the defendant KKR affiliates, and each of the other general partners; (c) whether defendants participated in fraudulently suppressing material facts, made material misrepresentations, or omitted to disclose material facts to plaintiffs and members of plaintiff class (or caused Bruno's to do so, or conspired to cause Bruno's to do so or aided and abetted Bruno's in doing so) in the Prospectus and Supplemental Prospectus dated August 10, 1995 used to offer and sell Bruno's Notes and in subsequent SEC filings, news releases, 10-K's, 10-Q's, letters to shareholders, and other

written documents authored or released to the public, which facilitated the offering and sale of such Notes in August 1995 and thereafter affected and artificially maintained the market and market price for such Notes and which concealed or misrepresented the true financial condition of Bruno's or which concealed and prevented the discovery by plaintiff's and members of plaintiff class of prior wrongdoing, prior omissions, or prior misstatements of material facts; and (d) whether the individual defendants who are now, or were, at times relevant, directors of Bruno's, violated their fiduciary duties to plaintiffs and members of plaintiff class at times when Bruno's was insolvent or unable to meet its obligations as they matured; (e) whether a money judgment for compensatory and punitive damages should be entered against defendants in favor of plaintiffs and members of plaintiff class; and (f) whether other, further and different relief should be granted to plaintiffs and members of plaintiff class in light of the facts alleged herein.

5. The claims of the plaintiffs are typical of the claims of members of plaintiff class, and plaintiffs have no conflicts with any class members with respect to pursuing this action.

6. Plaintiffs have retained counsel experienced in class litigation.

II. DEFENDANTS

7. Defendant KOHLBERG, KRAVIS, ROBERTS & CO., L.P. (hereinafter "KKR") is an investment banking firm which is organized as a Delaware limited partnership with its principal place of business at Nine West 57th Street, New York, New York 10019.

8. Defendant KKR ASSOCIATES, L.P., is a New York limited partnership with its principal place of business at Nine West 57th Street, New York, New York 10019, is an affiliate of defendant KKR, and at times relevant was the general partner of defendant CRIMSON ASSOCIATES, L.P.

9. Defendant KKR PARTNERS, II, L.P. is a limited partnership organized by defendant KKR, and has its principal place of business at Nine West 57th Street, New York, New York 10019.

10. Defendant CRIMSON ASSOCIATES, L.P. is a limited partnership organized by KKR, and has its principal place of business at Nine West 57th Street, New York, New York 10019.

11. At all times relevant, defendant KKR has owned and controlled defendants KKR ASSOCIATES, L.P., KKR PARTNERS II, L.P., and CRIMSON ASSOCIATES, L.P. (herein the "defendant KKR affiliates"). Each of the defendant KKR affiliates is a limited partnership organized, controlled and used by defendant KKR as a conduit for the acquisition and control of unrelated "target" companies, including Bruno's, Inc. Defendant KKR and the defendant KKR affiliates are herein sometimes collectively referred to as "KKR" or the "KKR defendants."

12. The leveraged recapitalization of Bruno's was accomplished pursuant to an agreement and plan of merger dated April 20, 1995 (as amended as of May 18, 1995) by and between Bruno's, Inc. and CRIMSON ACQUISITION

CORP. (a jointly owned subsidiary of CRIMSON ASSOCIATES, L.P. and KKR PARTNERS II, L.P.) approved by shareholders of Bruno's at a stockholders meeting held August 18, 1995.

13. On information and belief, at all times relevant the defendant KKR, the defendant KKR affiliates, and the KKR partner defendants dominated, controlled, and directed the affairs, finances and business practices of Bruno's, and each of Bruno's subordinate and affiliated entities to such an extent that each of the KKR defendants and the KKR partner defendants is the instrumentality, adjunct, agent, and/or alter ego of the others. Thus, defendant KKR, each such Limited Partnership, and each of the general partners of KKR is liable for the acts and omissions of Bruno's and the acts and omissions of the other general partners and KKR defendants.

14. Since the August 18, 1995 "leveraged recapitalization," KKR and its affiliates have beneficially owned a controlling interest (approximately 83%) of Bruno's outstanding common stock. At all times following the August 18, 1995 leveraged recapitalization, KKR and its affiliates have managed and controlled Bruno's.

15. Defendant HENRY R. KRAVIS is a general partner of defendant KKR.

16. Defendant GEORGE R. ROBERTS is a general partner of defendant KKR.

17. Defendant EDWARD A. GILHULY is a general partner of defendant KKR.

18. Defendant PERRY GOLKIN is a general partner of defendant KKR.

19. Defendant JAMES H. GREENE, JR. is a general partner of defendant KKR.

20. Defendant ROBERT I. MACDONNELL is a general partner of defendant KKR.

21. Defendant MICHAEL W. MICHELSON is a general partner of defendant KKR.

22. Defendant PAUL E. RAETHER is a general partner of defendant KKR.

23. Defendant CLIFTON S. ROBBINS is a general partner of defendant KKR.

24. Defendant SCOTT M. STUART is a general partner of defendant KKR.

25. Defendant MICHAEL T. TOKARZ is a general partner of defendant KKR.

26. Defendants KRAVIS, ROBERTS, GILHULY, GOLKIN, GREEN, MACDONNELL, MICHELSON, RAETHER, ROBBINS, ROBERTS, STUART and TOKARZ are referred to collectively as "KKR partner defendants."

27. On information and belief, each of the KKR partner defendants is now, and at all times relevant was, a general partner of KKR and the defendant KKR affiliates.

28. Pursuant to Sections 10-8-51 through 10-8-56 of the Code of Alabama (1975), defendant KKR, each of the defendant KKR affiliates, and each of the KKR partner defendants is jointly and severally liable for all of the acts and omissions of defendant KKR, the defendant KKR affiliates, and the KKR partner defendants, and each is chargeable with notice and knowledge of each of the

partners relating to partnership affairs and other matters relating to partnership affairs which reasonably could and should have been communicated to the partnerships and to other individual general partners.

29. Defendant RONALD G. BRUNO was chairman, chief executive officer, and a director of Bruno's prior to the August 1994 leveraged recapitalization, and owned or had voting rights to 6,111,125 shares of Bruno's common stock as of July 11, 1995. Defendant BRUNO was the beneficial owner of shares of Bruno's common stock redeemed pursuant to the August 1995 leveraged recapitalization. Prior to the August 1995 recapitalization, he entered into an employment continuity agreement and a deferred compensation agreement, and received certain stock options which vested as of July 1, 1995 with an aggregate present value in excess of $3 million as of July 17, 1995. He resigned as chairman and chief executive officer of Bruno's in September 1995, but continued as a director and thereafter has served as a director.

30. Defendant WILLIAM J. BOLTON was the chairman of Bruno's board of directors and president of Bruno's following the August 1995 leveraged recapitalization and thereafter has served as a director.

31. Defendant ROBERT G. TOBIN became a director of Bruno's following the August 1995 leveraged recapitalization, and thereafter has served as a director.

32. Defendant NILS P. BROUS became a director of Bruno's following the August 1995 leveraged recapitalization, and thereafter has served as a director.

33. KKR partner defendants KRAVIS, ROBERTS, GREENE, and RAETHER also became directors of

Bruno's following the August 1995 leveraged recapitalization, and thereafter each has served as a director.

34. Defendants BRUNO, BOLTON, TOBIN, BROUS, KRAVIS, ROBERTS, GREENE, and RAETHER are referred to collectively as "the director defendants."

35. On information and belief, defendant CHASE MANHATTEN BANK is currently acting as agent for holders of "Senior Indebtedness" of Bruno's and is successor-in-interest to Chemical Bank, which acted as Lead Bank on behalf of the Senior Lenders who were participants in the leveraged recapitalization complained of herein who on or about August 18, 1995 willfuly and recklessly lent Bruno's $470,000,000 pursuant to term loan and an additional $10,100,000 pursuant to a "Revolver" with knowledge that Bruno's would not receive the substantive benefits of the loans, with knowledge that the proceeds of these loans were earmarked for uses that did not and would not benefit Bruno's, and with knowledge that Bruno's would not receive reasonably equivalent value or fair consideration as part of the leveraged recapitalization, that Bruno's would be rendered insolvent by the leveraged recapitalization, that Bruno's was engaged in a business for which the capital and assets Bruno's was left with after the leveraged recapitalization, Bruno's would incur debts that would be beyond its ability to pay as they matured.

36. Defendant MURRAY DEVINE & CO., a Pennsylvania corporation, on August 18, 1995 rendered a solvency opinion to the board of directors of Bruno's, Chemical Bank, and other lenders in connection with the leveraged recapitalization of Bruno's. Said defendant was aware from its review of historical financial statements of

Bruno's, pro forma financial statements for Bruno's after giving effect to the proposed leveraged recapitalization, and KKR's Projections, that (1) upon consummation of the leveraged recapitalization, Bruno's would be assuming approximately $900 million in long-term debt; (2) the interest which Bruno's would be required to pay on such debt would be more than $80 million per year; (3) the aggregate projected interest payments would exceed Bruno's entire aggregate income during each of the preceding three years; (4) KKR's Projections assumed average sales growth for Bruno's of 7% per year, even though Bruno's total sales for fiscal 1994 were flat as compared with fiscal 1993; (5) the KKR Projections assumed Bruno's would have *no* store closings, and assumed significant new store openings (14, 10, 13, 15 and 17, respectively, during each of the five years following the leveraged recapitalization), even though Bruno's had closed 17 stores and had more than 3 million square feet in closed stores (the largest amount in its history) as of April 18, 1995 and was evaluating the impact of discontinuing operations at 10 additional stores; (6) KKR's Projections assumed average same-store sales increases of 1.5% per year after the leveraged recapitalization, even though Bruno's average same-store sales had *declined* at the rate of .9% each year over a three-year period according to Robinson-Humphrey Company's written presentation entitled "Project Crimson" to Bruno's Board dated November 17, 1994; and (7) the Subordinated Notes (aggregating $400 million) were due to be paid in full on August 1, 2005 and could not be paid by Bruno's in the absence of a new financing, merger, sale of assets, or equity offering. Defendant MURRAY DEVINE & CO. willfully participated in the leveraged recapitalization complained of herein, knowingly rendered

substantial assistance to the other defendants in consummating the leveraged recapitalization, and was grossly negligent or acted in reckless disregard of said defendant's obligations, or was guilty of willful misconduct or bad faith in failing to independently evaluate the reasonableness of KKR's Projections and in assuming the correctness of, adopting and utilizing KKR's Projections and in preparing and submitting defendant MURRAY DEVINE & CO.'s solvency opinion.

37. Defendant SALOMON SMITH BARNEY, a member of Citigroup, has an office and place of business located at 505 20th Street North, Suite 900, Birmingham, Alabama 35203, and is, on information and belief, successor-in-interest to ROBINSON-HUMPHREY CO. L.L.C., a Delaware limited liability company (which participated as advisor to the management of Bruno's and rendered opinions used in connection with the leveraged recapitalization of Bruno's complained of herein), and is also successor-in-interest to Salomon Brothers, Inc. (which participated as advisor to KKR in connection with the leveraged recapitalization of Bruno's complained of herein).

38. Defendants A through M are persons or entities whose identities and addresses are presently unknown to plaintiffs (but will be supplied by amendment hereto), who participated in, assisted, conspired with or otherwise facilitated the named defendants' fraudulent transfers of Bruno's assets in order to hinder, delay and defraud Bruno's creditors, including plaintiffs;

39. Defendants N through Z are persons or entities whose identities and addresses are presently unknown to plaintiffs (but will be supplied by amendment hereto), who

participated in, assisted, conspired with or otherwise facilitated the named defendants' fraudulent transfers of Bruno's assets for less than reasonably equivalent value causing Bruno's to become insolvent, undercapitalized, left with insufficient assets to conduct business, or unable to pay its debts as they came due;

40. Defendants AA through MM are persons or entities whose identities and addresses are presently unknown to plaintiffs (but will be supplied by amendment hereto), who participated in, assisted, conspired with or otherwise facilitated the named defendants' fraudulent transfers of Bruno's assets for less than reasonably equivalent value while Bruno's was insolvent, undercapitalized, left with insufficient assets to conduct business, or unable to pay its debts as they came due;

41. Defendants NN through ZZ are persons or entities whose identities and addresses are presently unknown to plaintiffs (but will be supplied by amendment hereto), who participated in, aided and abetted, assisted, conspired with or otherwise facilitated the named defendants' violations of statutes and common law, material misstatements and material omissions and misconduct giving rise to the claims of plaintiffs and members of plaintiff class for damages alleged herein.

42. Defendants AAA through ZZZ are persons or entities whose identities and addresses are presently unknown to plaintiffs (but will be supplied by amendment hereto), who accepted and received monies and other assets in transfers of property by Bruno's in which Bruno's did not receive equivalent value, either in connection with the leveraged recapitalization of Bruno's complained of herein or in subsequent transfers of property by Bruno's,

for which Bruno's did not receive equivalent value, while Bruno's was insolvent and unable to pay its debts as they matured and while Bruno's was controlled by the director defendants and by the KKR defendants.

43. Defendants A through ZZZ are referred to collectively as the "fictitious defendants."

44. Once the true identities of the fictitious defendants are discovered, plaintiffs will amend the Complaint to state the true identity of such defendants.

III. JURISDICTION AND VENUE

45. This Court has subject matter jurisdiction over the claims based on Alabama law which are asserted herein by plaintiffs, for themselves and for members of plaintiff class. Pursuant to Sections 8-9A-4, 8-9A-5 and 8-9A-7, Code of Alabama (1975), and principles of law enunciated in ***Shearson Lehman Hutton v. Wagoner***, 944 F.2d 114 (2nd Cir. 1991), and ***In the Matter of Zale Corp.***, 63 F.3d 746 (5th Cir. 1995), plaintiffs and members of plaintiff class have direct causes of action against defendants under Alabama law which plaintiffs and members of plaintiff class are entitled to assert in this action. Pursuant to principles of law enunciated in ***Pierce v. Pierce***, 652 So.2d 233 (Ala. 1994) and ***Simmons v. Clark Equipment Credit Corp.***, 534 So.2d 398, 399 (Ala. 1989), Bruno's is not a necessary party defendant to this action. This action asserts *only* such direct claims as are owned by plaintiffs and members of plaintiff class and which plaintiffs and members of plaintiff class are entitled to assert *directly* against defendants under Alabama law. Plaintiffs and members of plaintiff class do not in this action assert or seek to assert any claims owned by

Bruno's. Moreover, plaintiffs do not in this civil action seek damages or relief on behalf of Bruno's. On information and belief, this Court (or the Jefferson County Circuit Court in which this action was originally filed) has personal jurisdiction over the defendants, and venue properly lies in this Court (or in the Jefferson County Circuit Court) because many of the acts comprising the transactions giving rise to the violations of law complained of herein, including the failure to disclose material information and the preparation and dissemination to investors of false and misleading information, occurred in this jurisdiction. Certain of the director defendants named herein resided in or worked in this jurisdiction at times relevant to the allegations herein, and performed many of the acts complained of herein within this jurisdiction. KKR and its affiliates performed or caused a number of acts to be performed in this jurisdiction in connection with the violations of law complained of herein. By way of example, in connection with the conspiracy complained of herein, defendant KKR caused CRIMSON ACQUISITION CORP. to be organized as an Alabama Corporation with its principal place of business in Birmingham, Alabama.

IV. GENERAL ALLEGATIONS

46. Bruno's was a publicly traded company, and its common stock was traded on NASDAQ. Bruno's was at all times relevant engaged in the retail grocery business and was a leading supermarket operator in various southeastern markets in the United States, such as Georgia, Florida, Tennessee, Mississippi and South Carolina. Bruno's was the largest supermarket operator in the State of Alabama. Bruno's owned and operated supermarkets and grocery stores in these various markets under the names

Bruno's, Piggly-Wiggly, Food World, Food Max, Food Fair and Vincent's. These supermarkets and stores were targeted towards market segments involving every day low price stores, upscale stores and neighborhood stores.

47. In November of 1994, Bruno's management engaged Robinson-Humphrey, an investment banking and advisory firm.

48. At all times relevant since November of 1994, KKR and the KKR defendants have held themselves out as having special expertise in the grocery retailing industry, intending that Bruno's management, shareholders and creditors rely on their representations. Bruno's management, shareholders and creditors did so rely.

49. In December of 1994, KKR contacted Bruno's. KKR and Bruno's management executed a confidentiality agreement, and KKR thereafter effectively controlled and dominated Bruno's actions and business decisions.

50. On March 20, 1995, Bruno's management and Robinson-Humphrey met with KKR and Salomon Brothers, Inc., KKR's investment bankers in New York City, to discuss the terms of a possible transaction between Bruno's and KKR. At this meeting, KKR proposed to purchase Bruno's common stock in a cash merger for $12 per share.

51. On April 5, 1995, KKR revised its offer, proposing that each share of Bruno's common stock be purchased for $12.50 in cash (the "KKR Proposal").

52. On April 13, 1995, Bruno's management met to consider the KKR Proposal. The KKR Proposal was revised to permit, *inter alia*, reimbursement of KKR's out-of-pocket expenses. Furthermore, to protect KKR's

position, the Board also adopted a provision that limited the right of Bruno's to engage in discussions or negotiations with third parties.

53. On April 18, 1995, Bruno's board of directors met to review and discuss the KKR proposal. The board authorized the drafting of a definitive merger agreement, based upon the terms proposed by KKR.

54. On April 20, 1995, Bruno's board of directors reconvened. At this meeting, Robinson-Humphrey advised management that, in its opinion, the consideration to be received by Bruno's shareholders pursuant to the merger contemplated by the KKR Proposal was fair. On that same day, Bruno's and Crimson Acquisition Corp., an affiliate of KKR, entered into a merger agreement (hereinafter the "initial agreement"), and members of the Bruno family (who held 24% of Bruno's outstanding stock) entered into an agreement with KKR or with one or more of KKR's affiliates under which the members of the Bruno family agreed, *inter alia*, that they would vote their shares of stock in favor of the takeover.

55. Bruno's announced its third quarter financial results on May 1, 1995. On or about May 8, 1995, KKR received a written report from Deloitte & Touche, LLP ("Deloitte") entitled "Project Crimson Due Diligence" (herein "Project Crimson Report" or "Report") which described the extensive investigation and procedures which Deloitte had performed on behalf of KKR in evaluating the operations, books, records, financial condition, financial statements, and financial reporting of Bruno's. In its Report, Deloitte provided the KKR defendants with material information with respect to Bruno's operation, books, records, financial condition, financial statements,

financial reporting, deteriorating financial condition, and deteriorating operations. In its Report, Deloitte reported that Bruno's had overstated its assets and net worth; that its real estate assets were overstated by at least $8.5 million; that a reserve of at least $4 million would be required on existing closed stores; that Bruno's currently had over 3 million square feet of closed stores, the largest amount in its history; that 17 stores were closed and 14 were vacant as of April 18, 1995; that Bruno's had failed to accrue future net lease obligations with respect to closed stores; and that in addition to the stores already closed, Bruno's was evaluating the impact of discontinuing operations at 10 additional stores. The Report reported that Bruno's inventory was overstated by at least $5.3 million; that Bruno's technology was antiquated, not state-of-the-art, and would require significant investment; that the value of Bruno's technology equipment was overstated by approximately $5 million; that technology depreciation expense was understated by $3.8 million per year; and that Bruno's reserves for workers compensation claims and general liability claims was understated by approximately $33 million.

56. On or about May 16, 1995, KKR insisted on revisions to the initial agreement including:

(a) For each share of Bruno's Common Stock tendered pursuant to the merger, a shareholder would receive $12.00 (rather than $12.50 as provided for in the initial agreement) and that the number of shares to be retained by existing shareholders would be increased from 10% to approximately 16.67% of the shares outstanding at the time of the merger; and

(b) The KKR Partnerships would receive not only approximately 83.33% of the outstanding shares of Bruno's common stock, but would also receive warrants entitling the KKR defendants to purchase an additional 10,000,000 shares of Bruno's common stock for $12 per share (the initial agreement did not provide for the issuance of warrants).

57. On May 18, 1995, Bruno's announced adjustments to its previously announced third quarter results (reducing Bruno's previously reported net income of $12.3 million to a net loss of $4.6 million and for the year to date from $37.9 million to $21 million. These adjustments were inadequate. Bruno's should have made additional material disclosures and adjustments in its public filings in light of the information disclosed in Deloitte's Project Crimson Report, but Bruno's did not do so, and the KKR defendants failed to do so (or to cause Bruno's to do so). On the same date, Bruno's board of directors met to consider the revised agreement (hereinafter the "revised agreement"). At this meeting Robinson-Humphrey delivered a second fairness opinion, which concluded that the consideration received by Bruno's shareholders under the revised agreement would be fair.

58. On May 18, 1995, Bruno's Board approved the revised Merger Agreement and recommended that Bruno's shareholders approve the merger and approve the terms of the revised Merger Agreement.

59. On August 10, 1995, Bruno's publicly offered and sold to members of plaintiff class $400 million of Notes pursuant to a Prospectus and Supplemental Prospectus dated August 10, 1995, which was materially misleading,

and omitted to disclose material facts known by defendants set out in the Project Crimson Report. Among other things, the Prospectus and Supplemental Prospectus failed to disclose material findings and conclusions of Deloitte described in paragraph 55 hereinabove. Moreover, the Prospectus and Supplemental Prospectus stated:

> [Bruno's] believes that the *fair market value* of its owned real estate assets *exceeds the book value of such assets.*"
>
> [Bruno's] has developed *a modern well maintained store base.*"
>
> "As a leading regional supermarket operator, [Bruno's] has developed the following principal strengths: (i) *strong competitive position*, (ii) *prime locations*, (iii) *attractive Southeast markets*, (iv) *recently remodeled and new store base*, (v) enhanced store mix, (vi) experienced and well-trained workforce and (vii) *valuable real estate portfolio.*"
>
> [Bruno's] believes that many of its current store locations *are in prime sites that offer significant competitive advantages.*"

60. On August 18, 1995, the revised Merger Agreement was approved at a special meeting of Bruno's stockholders. On information and belief, defendant RONALD G. BRUNO voted in favor of the merger and leveraged recapitalization.

61. Thereafter, Bruno's engaged in the transfers described in this paragraph (herein "the leveraged recapitalization transfers" or "the transfers") of Bruno's monies and assets, for which Bruno's did not receive reasonably equivalent value, to KKR, certain shareholders of Bruno's,

including defendant RONALD G. BRUNO, defendant ROBINSON HUMPHREY, and others. The transfers included the transfers of monies which Bruno's received as proceeds from the August 10, 1995 public offering of the Notes. The leveraged recapitalization transfers, including costs and expenses associated with the leveraged recapitalization, aggregated approximately $1,155,100,000, and are described below:

(a) Bruno's paid out $880,100,000 to its shareholders for shares of Bruno's common stock;

(b) Bruno's paid $100,000,000 plus accrued interest to holders of Bruno's 6.62% Series A Senior Notes due 2003 to redeem said Notes;

(c) Bruno's paid $100,000,000 plus accrued interest to holders of its 7.09% Series B Senior Notes due 2008 to redeem said Notes; and

(d) Bruno's paid fees and expenses of $75,000,000, including:

$15,000,000 to KKR, not including reimbursed expenses;

$2,351,989.81 to Robinson-Humphrey;

$10,226,057.80 to BT Securities Corporation ("BT Securities"), representing underwriting expenses and intrabank funding costs in connection with the August 10, 1995 offering of Bruno's Notes;

$14,730,166.44 to Chemical Bank for its fee as administrative agent of the Term Loan; and

$4,882,557.50 to Wachovia Bank of North Carolina for termination of an interest rate swap.

62. As a result of the above-described leveraged recapitalization transfers, Bruno's was rendered insolvent and was stripped of assets sufficient for it to meet its debts and obligations as they matured. Moreover, the low interest Series A and Series B Notes owed by Bruno's were replaced by higher cost obligations owed by Bruno's described in the next paragraph hereof.

63. The leveraged recapitalization, was "financed" through the use of $1,155,100,000 in aggregate funds, consisting of:

(a) proceeds of a term loan facility provided by Chemical Bank in the aggregate amount of $475,000,000 (the "Term Loan");

(b) $10,100,000 of a $125,000,000 revolving credit facility provided by Chemical Bank (the "Revolver");

(c) proceeds of a public offering by BT Securities of $400,000,000 of 10½% Senior Subordinated Notes due 2005 (the "Subordinated Notes");

(d) a cash equity investment of $250,000,000 by KKR; and

(e) $20,000,000 of Bruno's then-existing cash on hand.

64. Bruno's Form 10-K for the post-leveraged recapitalization transition period ended January 27, 1996 reported that Bruno's stockholders' equity was $422,478,000 one month prior to consummation of the leveraged recapitalization. The same Form 10-K reported that after giving effect to the leveraged recapitalization, Bruno's stockholders' equity was a deficit of $281,343,000. If adjustments which should have been made in light of the information

disclosed in Deloitte's Project Crimson Report had been made, the reported equity (after the recapitalization) would have been a *deficit* of more than $313 million.

65. As a result of the leveraged recapitalization, Bruno's: (1) incurred approximately $885 million in debt obligations, including $475 million of Senior Indebtedness owed its bank, $400 million of Bruno's 10-1/2% Subordinated Notes, and approximately $10 million owed Chemical Bank on a revolving bank loan. Moreover, Bruno's cash reserves were depleted by a transfer of approximately $20 million from its existing cash reserves to make the payments described in paragraph 58 hereinabove.

66. The leveraged recapitalization transfers of assets by Bruno's for which Bruno's did not receive reasonably equivalent value (described in paragraph 58 above), the depletion of Bruno's cash reserves, and the replacement of Bruno's low interest cost Series A and Series B Notes with higher interest cost obligations described in paragraph 62 rendered Bruno's insolvent or unable to pay its debts and obligations as they matured, left Bruno's in desperate financial condition, and operated as a fraud upon Bruno's existing and future creditors, including plaintiffs and members of plaintiff class.

67. These transactions – all part of the leveraged recapitalization orchestrated by KKR – imposed such heavy debt obligations upon Bruno's that Bruno's could not meet the debt service requirements and could not survive as a business entity.

68. As a result of the leveraged recapitalization, Bruno's was insolvent or was placed in a zone of insolvency and was unable to meet its debts as they became due in the regular course of business.

69. During the fiscal year ended February 1, 1997, Bruno's instituted a divestiture program which Bruno's closed its distribution center in Vidalia, Georgia and sold or closed 47 stores, including 37 stores in Georgia, five stores in South Carolina, two stores in Florida, two stores in Alabama and one store in Mississippi, and reported a loss of $88,588,000 on the divestiture of the 47 stores.

70. In December 1996, Bruno's acquired Seessel Holding, Inc., which owned and operated eight supermarkets in Memphis, Tennessee and two supermarkets in Northern Mississippi.

71. Bruno's 10-K for the fiscal year ended February 1, 1997 was materially misleading, and unduly optimistic. It omitted to disclose, and was designed to conceal, material adverse information described in paragraph 78 of this Amended Complaint, including but not limited to the fact that Bruno's had failed to meet KKR's Projections. The 10K reported that net sales EBITDA, and gross profit (as a percentage of net sales) had all increased over the fifty-two week period ended January 27, 1996. Also, Bruno's reported that its store operating, selling and administrative expenses had decreased compared to the same time period.

72. Moreover, Bruno's reported that its loss for the fiscal year ending February 1, 1997 (before income taxes and extraordinary items) had decreased compared to the preceding fiscal year.

73. Bruno's also reported in its 10-K for the fiscal year ended February 1, 1997 that "The Company believes that operating cash flow will be sufficient to fund store expansion and working capital needs. If the Company needs additional operating cash, however, it has $78.8

million of a $125 million revolving credit facility available." In the same 10-K, Bruno's reported that it had utilized existing cash balances and cash flows from operating activities to prepay $65 million in principal on its term loan facility prior to the scheduled maturity date.

74. On February 2, 1998, Bruno's and its affiliates filed Chapter 11 proceedings in the Bankruptcy Court for the District of Delaware.

75. During the year immediately preceding its filing of Chapter 11 proceedings, Bruno's made charitable contributions, for which it received no equivalent value, aggregating $495,415.90.

76. In addition, Bruno's solicited substantial sums of money from certain of its vendors, which Bruno's in turn transferred, for no equivalent value, to Bruno's Memorial Classic Foundation, Inc., a not for profit organization, to be used to sponsor a golf tournament. In order to solicit such donations for the golf tournament, Bruno's agreed to forego rebates and allowances from such vendors. As a result, Bruno's income for the year immediately preceding this filing of Chapter 11 proceedings was substantially less, as a result of having foregoing such rebates and allowances from its vendors.

77. In addition to the fee of $15 million plus expenses aggregating $276,000 paid KKR on or about August 18, 1995 in connection with the leveraged recapitalization, KKR caused Bruno's to pay KKR "consulting fees," for which Bruno's received no reasonably equivalent value, aggregating $1 million a year up to the date of the filing of Chapter 11 proceedings. These payments included checks of $250,000 each (plus $126,000 as "reimbursement of expenses") dated March 1, 1997, May 9, 1997, August

20, 1997, and December 30, 1997 as "consulting fees" paid to KKR during the year preceding the February 2, 1998 filing of Bruno's Chapter 11 proceeding.

78. The KKR defendants knew at all times relevant after May 8, 1995 material adjustments and material adverse information concerning Bruno's which should have been disclosed, but was not disclosed, in Bruno's August 10, 1995 Prospectus and Supplemental Prospectus, and in subsequent documents (including Bruno's 10K's, 10Q's, 8K's, written news releases, and letters to shareholders). The KKR defendants knew, *inter alia*, that material adjustments should be made to Bruno's financial statements which had not been publicly disclosed, and knew that Bruno's had not prepared financial forecasts, cash flow projections, projections of capital expenditures, and return analyses in order to justify investment in new stores. The KKR defendants knew, *inter alia*, that KKR's Projections assumed significant increases in the number of new stores that would be opened even though there was a known trend of store closings and even though Bruno's management had additional closings under consideration. The KKR defendants knew that Bruno's had assumed approximately $900 million of long-term debt which would require interest payments in excess of $80 million per year (an amount in excess of Bruno's entire net income over the preceding three years) and that such interest payments could not be paid out of current income unless Bruno's was successful in expanding, adding new stores, and substantially increasing its same-store income (which had been declining). Moreover, at all times relevant after August 18, 1995, the KKR defendants were aware that KKR's Projections had been unrealistic and had not been met. Yet the KKR defendants failed to disclose or cause Bruno's to

disclose in its public filings and public news releases the fact that KKR's Projections were not being met and that Bruno's could not continue to meet its interest payments because of its declining sales, it closing of stores, and its failure to achieve the projected same-store growth in earnings. The KKR defendants knew, or were reckless or negligent in not knowing, especially in light of the Project Crimson report, that the Prospectus and Supplemental Prospectus dated August 10, 1995 and subsequent SEC filings, letters to shareholders and news releases contained material misrepresentations and material omissions, that the KKR defendants planned to close many of Bruno's stores, that the aggregate fair value of Bruno's assets was substantially less than the aggregate reported book value of such assets, that material writedowns of Bruno's real estate assets and other assets were necessary and appropriate, that the then current level of operations was not adequate to meet Bruno's anticipated requirements for working capital, capital expenditures, interest payments, and scheduled principal payments, that Bruno's was, or soon would be, insolvent, that Bruno's was, or soon would be, unable to pay its debts in the ordinary course of business, and that KKR was contemplating placing Bruno's in reorganization or bankruptcy proceedings. The KKR defendants concealed the true financial condition of Bruno's, the failure of Bruno's to meet KKR's Projections, the prior failures to disclose material information (including adjustments and material adverse information reported by Deloitte in the Project Crimson report), and the worsening condition of Bruno's. The KKR defendants' failure to disclose the true financial condition of Bruno's and the KKR defendants' prior wrongful acts and omissions were, on information and belief, all part of a continuing conspiracy and continuing fraudulent course of

conduct designed to prevent the purchasers and holders of Bruno's Notes from commencing legal actions at an earlier date. In addition, defendants wrongfully suppressed and concealed information which would have enabled plaintiffs and members of plaintiff class to take action at an earlier point in time. Accordingly, defendants are equitably estopped from asserting that plaintiffs and members of plaintiff class should have sued earlier. Plaintiffs have filed this Complaint and have asserted the causes of action set forth herein within and prior to the expiration of, any applicable statute of limitations. Pursuant to Section 6-2-3, Code of Alabama, any applicable statute of limitations did not commence to accrue, and was tolled, until discovery of defendants' wrongdoing.

COUNT I

FRAUDULENT TRANSFER ACT CLAIMS
(Direct claims Asserted Pursuant to §§ 8-9A-1, *et seq.*, Ala. Code)

79. Plaintiffs incorporate each of the previous allegations of this Complaint as if fully restated herein.

80. On August 18, 1995, KKR and other defendants caused Bruno's to make substantial transfers of monies (described in paragraph 61 of this Complaint) totaling $1,155,100,000 to third parties to accomplish a leveraged recapitalization of Bruno's. Bruno's did not receive reasonably equivalent value in return for the transfer of the $1,155,100,000.

81. Each of the defendants in this action knew or should have known at the time of the leveraged recapitalization consummated on or about August 18, 1995, and

acted willfully or recklessly in participating in the leveraged recapitalization, or is liable as a general partner of those who participated therein, that Bruno's would not receive the substantive benefits of the term loan and revolver loan, and with knowledge that the proceeds of these loans were earmarked for uses that did not and would not benefit Bruno's, and with knowledge that Bruno's would not receive reasonably equivalent value or fair consideration as part of the leveraged recapitalization, that Bruno's would be rendered insolvent by the leveraged recapitalization, that Bruno's was engaged in a business for which the capital and assets Bruno's was left with after the leveraged recapitalization were unreasonably small in relation to the business, and that as a consequence of the leveraged recapitalization, Bruno's would incur debts that would be beyond its ability to pay as they matured, thereby damaging plaintiffs and members of plaintiff class.

82. Bruno's did not receive a reasonably equivalent value for certain transfers of Bruno's monies and other assets which occurred after the August 18, 1995 consummation of the leveraged recapitalization, including, but not limited to, transfers or payments by Bruno's of monies and assets to KKR in the guise of "consulting fees" and reimbursement of expenses, for which Bruno's did not receive any reasonably equivalent value. The transfers described in this Amended Complaint which occurred after August 18, 1995 are hereinafter referred to as "the subsequent transfers." The leveraged recapitalization transfers and the subsequent transfers are herein referred to as "the transfers," and each such transfer operated as a fraud upon plaintiffs and members of plaintiff class, in violation

of the Alabama Fraudulent Transfer Act, Sections 8-9a-1 ***et seq.***, Code of Alabama (1975).

83. Bruno's became insolvent and was unable to pay its debts as they matured after, and because of, the transfers.

84. The director defendants and the KKR defendants defrauded plaintiffs when such defendants caused or permitted Bruno's to make "the transfers." The transfers were fraudulent as to Plaintiffs because the transfers failed to obtain for Bruno's a reasonably equivalent value in exchange for the assets transferred. Bruno's was left to engage in a business for which the remaining assets of Bruno's were unreasonably small in relation to Bruno's business.

85. Defendants knew and intended (or should have known) that Bruno's would incur debts beyond Bruno's ability to pay as such debts and obligations became due in light of and because of the "transfers."

86. "The transfers" of monies and assets which Defendants caused Bruno's to make were fraudulent as to Plaintiffs and other creditors of Bruno's whose claims arose before (or after) the transfers were made because Bruno's made "the transfers" without receiving a reasonable equivalent value in exchange for "the transfers"; furthermore, Bruno's was insolvent at the time of the transfers or Bruno's became insolvent as a result of "the transfers."

87. The transfers made by Bruno's were fraudulent as to Plaintiffs and other creditors of Bruno's whose claims arose before or after the transfers were made, because Bruno's did not receive reasonably equivalent value for the

transfers of monies and other assets of Bruno's, and because Bruno's was insolvent at the time, and the defendants knew or reasonably should have known that Bruno's did not receive reasonably equivalent value and Bruno's was rendered insolvent or would be unable to pay its debts as they became due, and Bruno's remaining assets were unreasonably small in relation to Bruno's business.

88. Plaintiffs bring this fraudulent conveyance action within four years after the transfers were made.

89. As holders of the Notes offered and sold by Bruno's on August 10, 1995, plaintiffs and members of plaintiff class are creditors of Bruno's whose claims are based on obligations or debts of Bruno's which arose before the transfers of Bruno's monies and other assets which occurred on August 18, 1995 described in paragraph 58 hereof.

90. As a direct and proximate result of defendants' actions, plaintiffs and members of plaintiff class were damaged, in an amount to be proven at trial.

WHEREFORE, plaintiffs for themselves and for members of plaintiff class, pray for the entry of a judgment for compensatory damages suffered by plaintiffs and members of plaintiff class, plus punitive damages for willful and reckless breaches of fiduciary duty owed by the director defendants and the KKR defendants to plaintiffs and members of plaintiff class as a result of "the transfers." Plaintiffs further pray for such other, additional and different relief to which they may be entitled, the premises considered.

COUNT II

CLAIMS FOR FRAUDULENT, RECKLESS, OR NEGLIGENT MISREPRESENTATIONS OR OMISSIONS, FRAUDULENT OR RECKLESS DECEIT, AND FRAUDULENT OR RECKLESS SUPPRESSION

91. Plaintiffs incorporate each of the foregoing allegations of this Amended Complaint as if fully stated herein.

92. At all times relevant, defendants, and each of them, knew that Bruno's was required by law to file reports with the Securities and Exchange Commission, which were made available to the public, including Noteholders and potential purchasers of Notes, brokers, bond traders, and investment advisors. Moreover, defendants, and each of them, knew (or should have known) that Section 3.01 of the Indenture Agreement imposed the following requirements on Bruno's:

> (a) The Company will file with the Trustee and provide Holders of Securities, within 15 days after it files them with the Commission, copies of its annual reports and of the information, documents and other reports (or copies of such portions of any of the foregoing as the Commission may by rule or regulation prescribe) which the Company is required to file with the Commission pursuant to Section 13 or 15(d) of the Exchange Act ("SEC Reports"). . . . the Company shall continue to file with the Commission and provide the Trustee and Holders with, without cost to each Holder, (a) within 90 days after the end of each fiscal year, annual reports on Form 10K (or any successor or comparable form) containing the information required to be contained herein (or

> required in such successor or comparable form); (b) within 45 days after the end of each of the first three fiscal quarters of each fiscal year, reports on Form 10Q (or any successor or comparable form); and (c) promptly from time to time after the occurrence of an event required to be therein reported, such other reports on Form 8K (or any successor or comparable form) containing the information required to be contained therein (or required in any successor or comparable form); The company will in all cases, without cost to each recipient, provide copies of such information to the Holders of the Securities . . .
>
> (b) The Company shall provide the Trustee with a sufficient number of copies of all SEC Reports that the Trustee may be required to deliver to the Holders of the Securities under this Section 3.01.

93. The KKR defendants and the director defendants made (or caused Bruno's to make) material misrepresentations and omitted to disclose material information in various written documents, including, but not limited to, the Form 10K's filed in 1995-1998; the Form 10-Q's filed in 1995-1998; the 8K's filed in 1995-1998; and the Prospectus and Supplemental Prospectus dated August 10, 1995. These actions by the defendants shall be collectively known as "Material Misrepresentations and Omissions." These Material Misrepresentations and Omissions constituted legal fraud as defined by Ala. Code §§ 6-5-100 and 6-5-102 (1975).

94. Defendants intended to deceive plaintiffs at the time they communicated these Material Misrepresentations and omitted to state material facts to plaintiffs,

because they were misrepresenting, suppressing and actively concealing material facts.

95. Defendants had a duty to disclose material facts to plaintiffs. Defendants breached this obligation by suppression of the truth, as well as by false statements or suggestions.

96. Defendants concealed or failed to disclose material facts alleged in the Complaint which have been incorporated by reference. Plaintiffs had no opportunity to ascertain these facts, while defendants at all times relevant possessed superior knowledge about these facts. Defendants were aware, *inter alia*, of Bruno's actual dire financial condition, the assumptions on which KKR's Projections had been made, the reliance of Murray Devine & Co., Robinson-Humphrey, and Salomon Bros. on such Projections, the fact that Bruno's at times relevant after August 18, 1995 did not achieve the KKR Projections, and other facts disclosed to KKR in Deloitte's Project Crimson Report, while plaintiffs and members of plaintiff class were not aware of such facts, which should have been (but were not) disclosed.

97. Defendants' concealment or failure to disclose these material facts induced plaintiffs to act to their detriment in reasonable reliance thereon or in reasonably refraining from acting.

98. These material misrepresentations and omissions to state material facts to plaintiffs and plaintiff class induced action on the part of plaintiffs.

99. Defendants made these Material Misrepresentations and Omissions: (1) with the intent to deceive plaintiffs; (2) with a reckless disregard for the truth; or (3) made them negligently.

100. Plaintiffs and members of plaintiff class acted upon and reasonably relied on these Material Misrepresentations and Omissions to their detriment by *inter alia*, deciding to purchase, retain, or sell the Notes and/or deciding whether to take other action which plaintiffs and members of plaintiff class were entitled to take. Plaintiffs and members of plaintiff class relied on defendants' actions, and plaintiffs' reliance was reasonable.

101. Defendants willfully made the Material Misrepresentations and Omissions to induce plaintiffs to act or refrain from acting. Defendants' actions constitute fraud as defined by Ala. Code §§ 6-5-100 and 6-5-101 (1975).

102. Defendants' actions constitute deceit as defined by Ala. Code §§ 6-5-103 and 6-5-104 (1975).

103. Defendants intentionally, willfully, and/or recklessly deceived plaintiffs and members of plaintiff class. Defendants acted with an evil mind and with a callous disregard for plaintiffs' rights and interest. Plaintiffs and members of plaintiff class are entitled to punitive damages.

104. Plaintiffs and members of plaintiff class were damaged as a direct and proximate result of the director defendants' deceptions.

105. Plaintiffs and members of plaintiff class have brought this action within the applicable statute of limitations period.

106. Plaintiffs and members of plaintiff class have been damaged in an amount to be proven at trial.

WHEREFORE, plaintiffs and members of plaintiff class pray for the entry of judgment for compensatory damages suffered by plaintiffs and members of plaintiff class, plus punitive damages for defendants' fraudulent, reckless, or negligent misrepresentations or omissions, fraudulent or reckless deceit, and fraudulent or reckless suppression. Plaintiffs and members of plaintiff class further pray for such other additional and different relief to which plaintiffs are entitled.

COUNT III

VIOLATIONS OF THE ALABAMA SECURITIES ACT

107. Plaintiffs incorporate each of the allegations of this Amended Complaint as if fully restated herein.

108. Defendants made Material Misrepresentations and Omissions during the relevant time period in connection with the offer, sale, or purchase of the Notes, which directly or indirectly: (1) employed a device, scheme, or artifice to defraud; (2) made untrue statements of material fact or omitted material facts, which were necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or (3) engaged in acts practices or course of business, which operated or did operate as a fraud or deceit upon plaintiffs, in violation of Ala. Code § 8-6-17, *et al.* (1975).

109. The Notes constitute a security within the meaning and purview of Ala. Code § 8-6-2(10).

110. Defendants, directly or indirectly, sold or offered to sell the Notes in violation of Ala. Code § 8-6-17. Defendants sold or offered to sell the Notes by means of untrue statements of material fact or omitted to state material facts necessary in order to make the statements made by defendants, in light of the circumstances under which they were made, not misleading.

111. Plaintiffs were not aware of the untruths and omissions made by defendants. Plaintiffs reasonably relied on the Material Misrepresentations and Omissions. Defendants' Material Misrepresentations and Omissions were incorporated into the price of the Notes.

112. Defendants knew or in the exercise of reasonable care, which they did not use, should have known of the untruths or omissions made in the Material Misrepresentations and Omissions.

113. Plaintiffs hereby tender their Notes to defendants.

114. Defendants directly or indirectly controlled people liable under subsections (a) and (b) of Ala. Code § 8-6-19. Defendants' actions materially aided in the conduct giving rise to the liability. Defendants knew or in the exercise of reasonable care, which they did not use, should have known of the existence of facts by reason of which the liability exists.

115. Plaintiffs have brought this action within the earlier of two years after discovery of the violations or two years after discovery should have been made by the exercise of reasonable care.

116. As a direct and proximate result of defendants' violations of the Alabama Securities Act, plaintiffs are

entitled to recover not less than the consideration paid for the Notes, together with interest, attorneys' fees, and costs, as provided in the Act.

117. Plaintiffs have suffered damages in an amount to be proven a trial.

118. Defendants willfully, recklessly, and intentionally violated the Alabama Securities Act. Defendants acted with an evil mind and with a callous disregard for plaintiffs' rights and interests.

119. The director defendants are liable to plaintiffs for punitive damages.

WHEREFORE, plaintiffs pray for the entry of judgment for compensatory damages suffered by plaintiffs, plus punitive damages for defendants' willful and reckless violations of the Alabama Securities laws. Plaintiffs also pray for attorneys' fees, costs and interest pursuant to § 8-6-19 of the Alabama Securities Act. Plaintiffs further pray for such other additional and different relief to which plaintiffs are entitled.

COUNT IV

BREACH OF FIDUCIARY DUTY

120. Plaintiffs incorporate each of the previous allegations of this complaint as if fully restated herein.

121. At all times relevant on and after the leveraged recapitalization, Bruno's was insolvent, stripped of the cash and other assets it needed to carry on and expand its business, burdened with high interest cost obligations, and was unable to pay its debts and obligations as they matured.

122. Accordingly, at all times relevant on and after the leveraged recapitalization, the director defendants owed a fiduciary duty to plaintiffs and members of plaintiff class, because Bruno's was insolvent, had a negative net worth, its obligations exceeded the book value and fair market value of its assets, and Bruno's was insolvent and unable to pay its debts and obligations as they matured, both at the time of the leveraged recapitalization and at all relevant times thereafter. Moreover, because KKR was hired to act as Bruno's "consultant" (for which KKR was paid $1 million each year) and because KKR dominated and controlled Bruno's and each of the director defendants at all relevant times on and after the leveraged recapitalization, KKR, each of the KKR partners, and each of the KKR affiliates owed a fiduciary duty to plaintiffs and members of plaintiff class.

123. These fiduciary duties include, among other things, duties of due care, loyalty, and full and fair disclosure.

124. The director defendants and each of the KKR defendants violated their fiduciary duties owed to plaintiffs and members of plaintiff class as follows:

(a) The KKR-controlled Board of Directors of Bruno's Inc. diverted and transferred monies and other assets of Bruno's to KKR and themselves and to creditors favored by KKR (including the holders of Senior Indebtedness) while Bruno's was insolvent. Moreover, the KKR defendants and the director defendants wasted, diverted, dissipated and unduly risked the assets of Bruno's which were available to pay the Notes which Bruno's owed to plaintiffs and members of plaintiff class;

(b) The defendant directors caused Bruno's to incur unnecessary debt and to take unnecessary risks in order to benefit KKR or to permit KKR to speculate for its own account by acquiring 83% of the stock of Bruno's with funds borrowed by Bruno's, including the proceeds realized by Bruno's in connection with Bruno's August 10, 1995 offering of the Notes;

(c) The KKR-dominated director defendants failed to disclose Bruno's true financial condition. If Bruno's true financial condition had been disclosed, plaintiffs and members of plaintiff class could have taken steps to minimize their losses;

(d) the KKR-dominated director defendants delayed the filing of Chapter 11 proceedings, delayed disclosure of Bruno's true financial condition, and incurred additional high interest cost debt, thereby sinking Bruno's deeper into insolvency;

(e) The KKR-dominated director defendants failed to use the assets of Bruno's in an informed good faith effort and thereby failed to maximize Bruno's long term wealth creating capacity;

(g) The KKR-dominated director defendants failed to use due care, breached their duty of loyalty to plaintiffs and members of plaintiff class, and failed to make full and fair disclosures to plaintiffs and members of plaintiff class.

125. As a direct and proximate result of director defendants' breach of fiduciary duty, plaintiffs and members of plaintiff class were damaged in an amount to be proven at trial.

126. Defendants acted willfully, in bad faith, or with a callous disregard toward the rights of plaintiffs and members of plaintiff class.

WHEREFORE, plaintiffs for themselves and for members of plaintiff class, pray for the entry of a judgment for compensatory damages suffered by plaintiffs and members of plaintiff class, plus punitive damages for willful and reckless breaches of fiduciary duty owed plaintiffs and members of plaintiff class by the director defendants and the KKR defendants. Plaintiffs further pray for such other, additional and different relief to which they may be entitled, the premises considered.

COUNT V

CIVIL CONSPIRACY

127. Plaintiffs incorporate each of the allegations of this Amended Complaint as if fully restated herein.

128. On information and belief, all of the defendants combined and conspired to cause Bruno's to make transfers of its monies and other property for which Bruno's did not receive reasonably equivalent value, in violation of the Alabama Fraudulent Transfer Act (Section 8-9A-1 ***et seq.***, Code of Alabama (1975)), and in violation of the director defendants' fiduciary duty to plaintiffs and members of plaintiff class. Moreover, on information and belief, all of the defendants combined and conspired to cause Bruno's to fraudulently suppress material facts which Bruno's and defendants were under a duty and obligation to communicate to plaintiffs and members of plaintiff class, and to cause Bruno's to make material misrepresentations and to omit to disclose material information necessary to make

statements made not misleading in various written documents (including but not limited to, the Prospectus and Supplemental Prospectus dated August 10, 1995, and in Form 10K's, Form 10Q's, Form 8K's, news releases and letters to shareholders) described in this Complaint as Material Misrepresentations and Omissions. Accordingly, each of the defendants is jointly and severally liable for the damages caused to plaintiffs and members of plaintiff class by the acts and omissions alleged herein, which constitutes overt acts in furtherance of the conspiracy, pursuant to principles of law enunciated in ***A.T. Stephens Enterprises v. Johns,*** ___ So.2d ___ Case No. 1980269 (Ala. Supreme Court, January 21, 2000); ***Lawler Mobile Homes, Inc. v. Tarver***, 492 So.2d 297, at 306 (Ala. 1986); ***Huckleberry v. M.C. Dixon Lumber Co., Inc.***, 503 So.2d 1209 at 1210-1211 (Ala. 1987); ***O'Dell v. State ex rel. Patterson***, 270 Ala. 236 (1959), and ***In re Hamilton Taft & Co., Wiley v. Howard Weil, Labouisse, Friedrichs Incorported***, 176 B.R. 895 (N.D.Cal. Bankr. Ct. 1995).

129. Defendants conspired in combination to accomplish an unlawful end or to accomplish a lawful end by unlawful means. An unlawful end or to accomplish a lawful end by unlawful means includes, among other things, the wrongful acts committed against plaintiffs.

130. Defendants acted in concert, pursuant to a common design, and/or conspired in combination with each other to accomplish the above-described wrongful acts committed against plaintiffs.

131. Defendants entered into an agreement/conspiracy to accomplish the above described wrongful acts committed against plaintiffs.

132. Plaintiffs were damaged by the wrongful acts committed by the alleged conspiracy.

133. The conspiracy aggravated the above-mentioned wrongful acts.

134. Defendants are liable for substantial losses suffered by plaintiffs as a direct and proximate result of the conspiracy, as described above.

135. The KKR defendants, director defendants, and other defendants recklessly, willfully, and intentionally conspired with each other, and acted with a callous and reckless disregard for the rights of plaintiffs and members of plaintiff class. Accordingly, plaintiffs and members of plaintiff class are entitled to punitive damages.

136. Plaintiffs have brought this action within the applicable statute of limitations period.

137. Plaintiffs have been damaged in an amount to be proven at trial.

WHEREFORE, plaintiffs for themselves and for members of plaintiff class, pray for the entry of a judgment for compensatory damages suffered by plaintiffs and members of plaintiff class, plus punitive damages for willful and reckless breaches of fiduciary duty owed plaintiffs and members of plaintiff class by all the defendants. Plaintiffs further pray for such other, additional and different relief to which they may be entitled, the premises considered.

COUNT VI

CLAIMS FOR AIDING AND ABETTING

138. Plaintiffs incorporate each of the allegations of this Amended Complaint as if fully restated herein.

139. On information and belief, all of the defendants knowingly joined and rendered substantial assistance in causing Bruno's to make transfers of its monies and other property for which Bruno's did not receive reasonably equivalent value, in violation of the Alabama Fraudulent Transfer Act (Section 8-9A-1 ***et seq.***, Code of Alabama (1975)). On information and belief, all of the defendants participated in the proceeds of the fraud, with knowledge of the fraud. On information and belief, all of the defendants knowingly joined and rendered substantial assistance in causing Bruno's to fraudulently suppress and fail to disclose material facts which Bruno's was under a duty and obligation to communicate to plaintiffs and members of plaintiff class, and in causing Bruno's to make material misrepresentations and to omit to disclose material information necessary to make statements made not misleading in various written documents (including, but not limited to, the Prospectus and Supplemental Prospectus dated August 10, 1995, and in Form 10K's, Form 10Q's, Form 8K's, news releases and letters to shareholders) described in this Complaint as Material Misrepresentations and Omissions. Accordingly, each of the defendants is jointly and severally liable for the damages caused to plaintiffs and members of plaintiff class by the acts and omissions alleged herein, under aiding and abetting principles enunciated in ***Riles, et al. v. Coston-Riles Lumber Co.***, 208 Ala. 508, 95 So. 43 (1922); ***In re Hamilton Taft & Co., Wiley v. Howard Weil, Labouisse,***

Friedrichs Incorporated, 176 B.R. 895 (N.D.Cal. Bankr. Ct. 1995); and ***Jackson v. Smith***, 254 U.S. 586 (1921).

140. During the relevant time period, defendants made (or caused Bruno's to make) Material Misrepresentations and Omissions to plaintiffs; fraudulently suppressed material facts, which they (and Bruno's) were under an obligation to communicate to plaintiffs, as defined by Ala. Code §§ 6-5-100 and 6-5-102 (1975); fraudulently or recklessly misrepresented material facts, as defined by Ala. Code §§ 6-5-100 and 6-5-101 (1975); fraudulently or recklessly deceived plaintiffs, as defined by Ala. Code §§ 6-5-103 and 6-5-104 (1975); and/or issued materially misleading Form 10K's, Form 10Q's, Form 8K's, and the Prospectus and Supplemental Prospectus dated August 10, 1995 in connection with plaintiffs' purchase, sale, or retention of the Notes, as defined by Ala. Code § 8-6-17, et seq. (1975).

141. During the relevant time period, defendants willfully or recklessly or negligently misrepresented material facts and omitted to disclose material facts in the written documents described in the preceding paragraph. The fraudulent transfers and misrepresentations and omissions during the relevant time period, shall hereinafter be known collectively as "Wrongful Acts."

142. Defendants knowingly participated in or aided and abetted the Wrongful Acts alleged herein by rendering substantial assistance in causing the Wrongful Acts to occur against plaintiffs by, including but not limited to, knowingly assisting and participating in the Wrongful acts.

143. Defendants knew, should have known, or were under a duty to know, that director defendants, KKR, and

other defendants committed wrongful acts against plaintiffs during the relevant time period.

144. Plaintiffs have asserted the claims alleged in this action within the applicable statute of limitations period.

145. Defendants are liable for the substantial losses suffered by plaintiffs and members of plaintiff class as a direct and proximate result of their aiding and abetting the above-described Wrongful Acts.

146. Defendants recklessly, willfully, and intentionally aided and abetted the above-described Wrongful Acts, and acted with a callous disregard for plaintiffs' rights and interests. Accordingly, defendants are liable to plaintiffs for punitive damages.

147. Defendants knew, or should have known, or were under a duty to know, that defendants or others were committing wrongful acts against plaintiffs.

148. Plaintiffs have been damaged in an amount to be proven at trial.

WHEREFORE, plaintiffs pray for the entry of Judgment for compensatory damages suffered by plaintiffs, plus punitive damages for defendants' actions in aiding and abetting the Wrongful Acts against plaintiffs. Plaintiffs further pray for such other, additional and different relief to which plaintiffs are entitled.

COUNT VII

OTHER CLAIMS OF PLAINTIFFS AND PLAINTIFF CLASS BASED ON THE FACTS ALLEGED HEREIN

139. Plaintiffs incorporate each of the preceding allegations of this Complaint as if fully restated herein.

150. As previously alleged in paragraph 28 of this Amended Complaint, pursuant to §§ 10-8-51 through 10-8-56, Code of Alabama, the defendant KKR, each of the defendant KKR affiliates, and each of the KKR partner defendants is jointly and severally liable for all acts and omissions of defendant KKR, the defendant KKR affiliates, and the KKR partner defendants, including, but not limited to, the directors of Bruno's who were also partners of KKR, and each such defendant is chargeable with notice and knowledge of each of the other such defendants.

151. Moreover, each of the defendants described in the preceding paragraph is jointly and severally liable as an alter ego of the other defendants described in the preceding paragraph.

152. In addition, plaintiffs and members of plaintiff class are entitled to recover judgment against defendants for such other direct claims as plaintiffs and members of plaintiff class are entitled to assert under Alabama law against defendants and each of them based on the facts alleged hereinabove.

WHEREFORE, plaintiffs for themselves and for members of plaintiff class, pray for the entry of a judgment against each of the defendants for compensatory damages suffered by plaintiffs and members of plaintiff class, plus punitive damages. Plaintiffs further pray for

such other, additional and different relief to which plaintiffs and members of plaintiff class may be entitled, the premises considered, including a declaratory judgment against each of the defendants declaring the rights of plaintiffs and members of plaintiff class.

Respectfully submitted,

/s/ J. Vernon Patrick, Jr.
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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing Amended and Restated Class Action Complaint was served by United States Mail, postage prepaid and properly addressed, on the following:

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This the 26th day of April, 2000.

/s/ J. Vernon Patrick, Jr.
J. Vernon Patrick, Jr.